

Vol 2049

United States
Circuit Court of Appeals

For the Ninth Circuit.

FIDELITY and DEPOSIT COMPANY OF
MARYLAND, a corporation,
Appellant,

vs.

THE STATE OF MONTANA and THE DE-
PARTMENT OF AGRICULTURE, LABOR
and INDUSTRY THEREOF, for use and
benefit of the holders of defaulted warehouse
receipts for beans stored in the public ware-
house of CHATTERTON and SON, a corpo-
ration, at Billings,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana.

FILED

FEB 24 1937

PAUL P. O'BRIEN,

United States
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FIDELITY and DEPOSIT COMPANY OF
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD:

MESSRS. WEIR, CLIFT & BENNETT,
Helena, Montana.
Attorneys for Defendant and Appellant.

MR. ENOR K. MATSON,
Attorney General of the State of Montana,
Helena, Montana,

MR. R. G. WIGGENHORN,
Billings, Montana.
Attorneys for Plaintiffs and Appellees. [1]*

* Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

LAW ACTION Number 917.

The STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR AND INDUSTRY THEREOF, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of CHATTERTON & SON, a corporation, at Billings, Montana,

Plaintiffs,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Defendant.

BE IT REMEMBERED, that on June 9th, 1932, TRANSCRIPT ON REMOVAL of this cause from the State Court was duly filed herein, the Complaint contained in said transcript being in the words and figures following, to wit: [2]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

No. 15977

THE STATE OF MONTANA, and the DEPARTMENT OF AGRICULTURE OF THE STATE OF MONTANA, for the use and benefit of the holders of warehouse receipts in the

public warehouse seed grain elevator of Chatterton & Son, a corporation,

Plaintiff

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation

Defendant.

COMPLAINT

The plaintiff complains and alleges:

1.

That Chatterton & Son is now and at all times herein mentioned was a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Michigan, and during all times herein mentioned was operating a public warehouse for storing beans at Billings, in the State of Montana, and at all times held itself out to the public as receiving beans for storage, and during all of such time held itself out to the public as a duly licensed and bonded corporation and warehouse under the laws of Montana and operating as such.

2.

That the defendant Fidelity and Deposit Company of Maryland is now and at all times herein mentioned was a foreign corporation organized and existing under and by virtue of the laws of the State of Maryland for the purpose of acting as surety on bonds, including the bonds of public

4 *Fidelity and Deposit Co. of Maryland vs.*

warehousemen of [3] the class herein mentioned, and during all the times herein mentioned was and now is conducting such business in the State of Montana.

3.

That on or about the 7th day of January, 1930, in consideration of the premium paid to defendant in the sum of One Hundred Dollars (\$100.00), upon the order and request of said Chatterton & Son defendant, as surety made and executed its certain bond and instrument in writing, with the said Chatterton & Son as principal, to the State of Montana, in the sum of Ten Thousand Dollars (\$10,000.00), conditioned that said Chatterton & Son indemnify the owners of beans stored in said warehouse at Billings, Montana, against loss and faithfully perform all the duties of and as a public warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture in relation to the business of public warehouseman; a true and correct copy of which said bond is hereto attached marked "Exhibit A" made a part hereof and hereby referred to for further particulars.

4.

That on or about the 15th day of January, 1930, said bond, after being so executed, was by defendant duly delivered to the agent and manager of said Chatterton & Son at Billings, Montana, and

the person in charge of said warehouse, with directions to him that said bond be delivered and filed with the Secretary of State of the State of Montana.

5.

That at the time of said execution and delivery of said bond, defendant was fully informed as to the exact nature and kind of warehouse and business being conducted by said Chatterton & Son at Billings, Montana, and executed and delivered [4] said bond in consideration thereof, and for the purpose of satisfying the requirements and demands of the Commissioner of Agriculture of the State of Montana, and so as to qualify the said Chatterton & Son in the State of Montana to conduct said warehouse at Billings, Montana.

6.

That subsequently thereto and prior to the first day of July, 1930, the defendant Fidelity and Deposit Company of Maryland made, executed and delivered its renewal certificate of said bonds in words and figures as set forth in "Exhibit B" hereunto attached and hereby made a part hereof, whereby the said bond was continued in force and effective to the first day of July, 1931.

7.

That on or before the first day of July, 1930 the said renewal certificate (Exhibit B) was mailed to the Commissioner of Agriculture of the State of

Montana, but addressed to Billings, Montana; that said renewal certificate at a later date was returned to defendant Fidelity and Deposit Company of Maryland, and later mailed to the agent and person in charge of the warehouse of Chatterton & Son at Billings, Montana, and said renewal certificate by its terms continued said bond in force for the year of July 1, 1930 to July 1, 1931.

8.

That the defendant Fidelity and Deposit Company of Maryland received from Chatterton & Son the sum of \$100.00 premium for the issuance and delivery of said renewal certificate.

9.

That in the month of May, 1931 the defendant Chatterton & Son having said bond and the renewal thereof in its possession at the request of the Commissioner of Agriculture of the State [5] of Montana delivered said bond and the renewal thereof to the State of Montana for the purpose of having the same filed and recorded in accordance with law and said bond and renewal certificate were so filed.

10.

That at all times between the first day of January, 1930 and the first day of July, 1931, the said Chatterton & Son, with the knowledge of the defendant, held itself out and represented to the growers and owners of beans in the territory in and about Billings, Montana, and particularly those hereinafter

named and referred to, that said warehouse of said Chatterton & Son at Billings, Montana was a duly licensed and bonded warehouse and that said Chatterton & Son was duly licensed and bonded to conduct such warehouse at Billings, Montana, and the persons hereinafter named and referred to acted and relied on said representations and at the time as hereinafter stated and set forth deposited their respective beans in the said warehouse for storage only, each receiving from said Chatterton & Son the customary warehouse receipts for such storage. That a total of over fifty thousand bags of beans of one hundred pounds each were thus stored in the said warehouse during the period from July 1, 1930 to June 30, 1931, all of which were so stored in full reliance on said representations as aforesaid and not otherwise.

11.

That notwithstanding the duty of said Chatterton & Son to preserve the identity of each of said lots of beans so stored so as to permit the delivery to each owner of the identical beans so stored by him, as required by law and by the terms of the said warehouse receipts so issued, the said Chatterton & Son wrongfully and unlawfully commingled all of said beans indiscriminately in its said warehouse and lost the identity of said beans, and during the period from July 1, 1930 to June 30, [6] 1931, said Chatterton & Son wrongfully removed all of said beans from the said warehouse and from the State of Montana and sold and delivered

them and shipped them out of the state, without accounting to the owners of said beans and converted the said beans to their own use. That each and all of such shipments, sales and conversions were without the knowledge or consent of the owners of said beans and holders of warehouse receipts for the same, respectively, and without the knowledge or consent of the Commissioner of Agriculture of the State of Montana.

12.

That upon discovery of said defalcation, shortly after July 1, 1931, demand was duly made upon said Chatterton & Son by the respective holders of warehouse receipts as aforesaid, and on their behalf by the said Commissioner of Agriculture of the State of Montana for the said respective lots of stored beans or the value thereof or the proceeds on the sale and disposition therefor, tendering the warehouse receipts therefor and offering to pay all advances, storage and all other legal charges against said beans, but that the said Chatterton & Son has wholly refused and failed to redeliver any of said beans and has been unable to do so, and has wholly failed to pay for the same except that it has turned over and paid to the said Commissioner of Agriculture of the State of Montana, in property or money, the equivalent of not to exceed \$25,000.00, which is the only satisfaction which the owners of beans and of said warehouse receipts have had.

13.

That precisely there were so stored and converted by said Chatterton & Son, during said period while said bond was effective by residents of Montana, a total in excess of 39,897 bags of Montana-grown beans, and the aggregate net value of said beans, at the times of the respective conversions, after crediting against the same all advances made and all proper charges and deductions [7] for storage, cleaning, handling and other charges, was the sum of \$65,843.57, and the consequent loss to the owners of said beans, after crediting the total amount so recovered as aforesaid is in excess of the sum of \$40,000.00.

14.

That there is attached hereto, marked "Exhibit C" and hereby referred to as a part hereof, a correct list and schedule showing the names of the Montana residents who stored said beans and held said warehouse receipts for beans grown in Montana, showing in each instance the quantity of beans stored, their grade, the date of shipment and conversion, the market value at time of conversion, the advances and charges against them and the net balance due in each case. That this action is brought for the benefit of all of the said Montana owners and holders of warehouse receipts as aforesaid, and is brought by the State of Montana at their special instance and request and at the request of each of them to the Attorney General of Montana.

15.

That the Department of Agriculture of Montana in the month of June, 1931 received notice of the insolvency of Chatterton & Son and of its inability to meet in full its storage and intervened in the interest of holders of warehouse receipts as above described and duly made demand on the defendant for payment of said bond which payment defendant refused and still refuses and the Department of Agriculture duly requested the Attorney General of Montana to bring the necessary action to collect payment on said bond.

16.

That on or about the 6th day of December, 1930 Chatterton & Son pretended to transfer the business above described to Chatterton & Son, Incorporated, a foreign corporation, which then was and still is duly organized and existing under the laws of the State of Kansas and which was a subsidiary corporation wholly owned by said Chatterton & Son, and which corporation assumed all [8] the outstanding bean storage obligations of Chatterton & Son, and defendant in writing authorized the necessary change in name of the principal to Chatterton & Son, Incorporated, and the defendant in writing on or about said date notified the Department of Agriculture of Montana and Chatterton & Son and Chatterton & Son, Incorporated. That, however, at all times thereafter the said two corporations were indistinguishable and

their identities and functions were not disclosed to the public and were separated by said two companies only as a matter of private accounting and convenience between them. That none of the owners of said beans and holders of said warehouse receipts aforesaid were notified of any such transfer of interest and none of them had any knowledge of the organization or existence of said Chatterton & Son, Incorporated, and all of the acts of conversion aforesaid were done and performed by both of said companies jointly and indiscriminately, none of the owners of said beans or holders of said warehouse receipts having consented to said transfer of interest and none of them having discharged the said Chatterton & Son.

WHEREFORE, Plaintiff demands judgment against defendant for the sum of \$20,000.00 and for its costs and disbursements herein, for the use and benefit of the holders of warehouse receipts in the seed grain elevator of Chatterton & Son, a corporation and Chatterton & Son, Incorporated.

L. A. FOOT

Attorney General

T. H. MacDONALD

Assistant Attorney General

BROWN, WIGGENHORN

& DAVIS,

Attorneys for Plaintiff. [9]

State of Montana

County of Lewis and Clark.—ss.

L. A. Foot first being duly sworn says: That he is Attorney General of the State of Montana and makes this verification as such on behalf of the State of Montana; that he has read the foregoing Complaint and knows the contents thereof and that the same is true according to his knowledge, information and belief.

L. A. FOOT

Attorney General

Subscribed and sworn to before me this 29th day of April, 1932.

[Seal]

HELENA C. STELLWAY

Notary Public for the State of Montana. Residing at Helena, Montana. My commission expires April 1, 1935.

Service of the within Summons and Complaint and receipt of copy acknowledged this 12th day of May, 1932, at 2:35 o'clock p.m.

GEO. P. PORTER,

State Auditor and Commissioner of Insurance.

By C. M. McCoy.

M.Mc.

Deputy Commissioner of Insurance.

Filed May 11, 1932, 10 a.m. Geo. H. Hays, Clerk of District Court; by A. W. Stow, deputy.

[Endorsed]: Filed June 9, 1932 [10]

EXHIBIT A

STATE OF MONTANA

Public Warehouseman's Bond

Bond #3591931

KNOW ALL MEN BY THESE PRESENTS:

That Chatterton & Son a corporation, organized and existing under and by virtue of the laws of the State of Michigan as principal and Fidelity and Deposit Company of Maryland a corporation organized and existing under and by virtue of the laws of the State of Maryland and authorized to do business within the State of Montana, as surety, are held and firmly bound unto the State of Montana, for the benefit of all parties concerned in the penal sum of \$10,000.00 Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, our successors and assigns, forever, jointly, severally, firmly by these presents. Sealed with our seals and dated this 7th day of January A.D. 1930.

THE CONDITION OF THIS OBLIGATION IS SUCH,

That whereas the above bounden Chatterton & Son being the lessee of a public local warehouses located at Billings in the State of Montana, and owned, controlled or operated by the said Chatterton & Son has applied to the Division of Grain Standards and Marketing of the Department of Agriculture, Labor and Industry of the State of

Montana for a license or licenses to open, conduct and carry on the business of public warehousemen in the State of Montana, for the period beginning Jan. 1, 1930, and ending July 1, 1930, in accordance with the laws of the State of Montana;

PROVIDED, That this obligation shall apply also to any and all other stations in the State of Montana at which the business of Public Warehousemen may be conducted by the said principal during the period for which it shall remain in force and effect.

NOW, THEREFORE, if the said Chatterton & Son shall indemnify the owners of grain stored in said warehouses against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture heretofore enacted or to be enacted hereafter in relation to the business of Public Warehouseman, then this obligation to be null and void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, The above named principal and the above named surety, by and through each of their duly authorized officers, have caused these presents to be executed and their and

each of their corporate seals affixed hereto on this
7th day of January A. D. 1930.

Approved by: W. H. MOORE

[Seal]

CHATTERTON & SON

Principal.

V. A. STICKLE

Vice-President.

[Seal]

J. H. CALKINS

Asst. Secretary.

FIDELITY AND DEPOSIT
COMPANY OF MARY-
LAND

Surety.

Approved: W. H. MOORE

By PAUL L. WELLS

Vice President

ROBERT HOWELL,

Assist. Secretary [11]

EXHIBIT B

No. 5809

Premium \$100.00

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

Baltimore.

CONTINUATION CERTIFICATE.

For Miscellaneous Term Bonds, Contract
Department.

Chatterton and Son, Lansing, Michigan as Principal, and the Fidelity and Deposit Company of Maryland, as Surety, in a certain Bond No. 3,591,931, dated the 7th day of January, 1930, in the penalty of Ten Thousand Dollars (\$10,000) in favor of State of Montana, do hereby continue said bond in force for the further term of one year beginning on the first day of July, 1930.

PROVIDED, however, that said bond, as continued hereby, shall be subject to all its terms and conditions, except as herein modified, and that the liability of the said Fidelity and Deposit Company of Maryland under said bond and any and all continuations thereof shall in no event exceed in the aggregate the above named penalty, and that this certificate shall not be valid unless signed by said Principal.

Signed, sealed and dated this tenth day of July,
1930.

[Seal]

CHATTERTON & SON
Principal
By A. H. MADEN,
Secretary
By H. E. CHATTERTON
Principal

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARY-
LAND
By FRED S. AXTEN,
Vice-President

Witness:

MARGARET D. LASENBY
J. H. CALKINS

Attest:

W. H. MOORE, Assistant Secretary

Form and execution—W. H. MOORE. [12]

EXHIBIT C.

REPORT ON CHATTERTON & SON STORAGE BEANS

		No.	Grade	Date of Shipt. to K. C.	Net Weight	Mkt. value time of shipt.	Total net value after H. P. deduction	Cash Advances	Misc. Charges Seed, Taxes, etc.	Balance due at time of Conversion
Winifred Annin	Columbus	22	96	10/13/30	2,200	4.00	88.00	55.00		33.00
Bert Appleby	Billings	199	96	2/ 5/31	19,900	2.50	498.50			497.50
Buxton & Appleby	Billings	143	98	12/ 1/30	14,300	3.50	500.50			500.50
E. S. Blodgett	Billings	168	96	10/29/30	16,800	3.75	630.00	400.00	137.50	92.50
Jake Benner	Park City	320	95	11/14/30	30,400	3.75	980.00	650.00	4.85	325.15
Lulu Boyd	Boyd	101	96	11/13/30	10,100	3.50	353.50	252.50		101.00
Bert Bowman	Billings	95	96	7/13/31	9,500	2.00	190.00		27.50	162.50
A. L. Baker	Billings	192	92	7/13/31	17,664	2.25	233.84		42.00	191.84
O. S. Bauman	Billings	{ 375	94	2/11/31	35,250					
O. S. Bauman	Billings	{ 12	88	2/11/31	1,056	2.75	759.03			{ 759.03
Jake Becker	Ballantine	612	93	7/13/31	56,916	2.25	852.21			852.21
H. M. Black	Sheridan	536	96	5/18/31	53,600	2.25	1,206.00			1,206.00
J. R. Barnett	Billings	{ 293	92	11/ 6/30	26,956	3.75				{ 739.45
J. R. Barnett	Billings	{ 44	96	7/13/31	4,400	2.00	864.45	125.00		{ 739.45
Wm. Benner	Park City	{ 250	95	11/14/30	23,750	3.75				{ 739.45
Wm. Benner	Park City	{ 192	96	11/17/30	19,200	2.50	1,437.62		24.50	{ 1,413.12
A. T. Barber	Billings	{ 141	90	1/22/31	12,630	3.00	239.70		28.00	{ 211.70
J. L. Barker	Billings	{ 2,109	93	7/13/31	196,137	2.25	2,936.78		193.36	{ 2,743.43
Harry Barker	Billings	{ 315	94	7/13/31	29,610	2.25				{ 545.20
Harry Barker	Billings	{ 34	96	7/13/31	3,400	2.00	545.20			{ 545.20
Jno. Chapman	Red Lodge	183	91	10/29/30	16,653					
Jno. Chapman	Red Lodge	267	93	10/29/30	24,831	4.00	1,307.76	1,125.00	6.15	176.61
J. W. Cole	Park City	103	97	1/28/31	10,300	2.75	283.25	154.00		129.25
Roy Covert	Billings	56	96	11/17/30	5,600	3.50	196.00			196.00
W. L. Cook	Billings	220	98	7/13/31	22,000	2.25	495.00	200.00	17.50	277.50
Chas. Daniels	Billings	419	96	7/13/31	41,900	2.00	938.00		6.75	931.25
J. B. Deavitt	Billings	{ 183	96	11/17/30	18,200	3.50				{ 897.02
J. B. Deavitt	Billings	{ 332	94	2/10/31	31,208	2.75	1,296.02	300.00	9.00	{ 897.02
B. R. Daugherty	Belfry	180	98	10/ 6/30	18,000	4.00	720.00	450.00		270.00
J. R. Daugherty	Belfry	269	96	10/ 6/30	26,900	3.75	1,008.75	672.50		336.25
Geo. Danford	Billings	105	96	12/ 4/30	10,500	3.25	341.25	150.00		191.25
Wm. De Vries	Columbus	41	98	10/13/30	4,100	4.25	174.25		33.05	141.20
Chas. Danford	Billings	{ 686	95	9/27/30	65,170	4.25		1,400.00		{ 1,060.72
Chas. Danford	Billings	{ 17	96	7/13/31	1,700	2.00	2,460.72	385.00		{ 290.00
										[13]
M. I. Draper,	Myers	225	98	1/17/31	22,500	3.00	675.00	385.00		290.00
J. G. Epperson	Billings	557	98	10/ 8/30	55,700	4.00	2,228.00			2,228.00
B. H. Frizzel	Billings	86	88	10/17/30	7,568	4.25	218.44	160.00		58.44
Sarah Fleming	Billings	24	96	10/18/30	2,400	4.00	96.00			96.00
Fred Fritz	Billings	794	88	1/ 2/31	69,872	3.50	1,492.72	100.00		1,392.72
Sarah Gross	Laurel	{ 207	95	10/18/30	19,665	4.00				{ 144.82
Sarah Gross	Laurel	{ 14	96	7/13/31	1,400	2.00	711.10	566.25		{ 144.82
Conrad Gabel	Billings	397	96	1/26/31	39,700	2.75	1,091.75			986.75
Jno. Giesick	Park City	178	98	12/26/30	17,800	3.50	623.00	265.00	72.65	285.35
P. Gallagher	Miles City	366	97	1/28/31	36,600	2.75	1,006.50	548.00		458.50
John Hergett	Billings	290	92	7/13/31	26,680	2.25	367.80	110.00		257.80
M. D. Hartley	Billings	41	96	2/11/31	4,100	2.50	102.50			102.50
L. S. Harrenbrack		81	96	11/14/30	8,100	3.50	283.50	160.00		123.50
Mrs. Geo. Hein	Laurel	{ 352	94	9/29/30	33,088					
Mrs. Geo. Hein	Laurel	{ 90	94	10/ 1/30	8,460	4.00	1,396.72	625.00		771.72
Dave Hergenreider		384	98	12/26/30	38,400	3.50	1,344.00	650.00	6.10	687.90
Leo Jahnk	Laurel	61	96	11/13/30	6,100	3.50	213.50	150.00		63.50
J. C. Kirk	Bridger	545	96	10/ 2/30	54,500	3.75	2,043.75	1,362.50		681.25
Mike Kilwine	Laurel	192	96	10/18/30	19,800	3.75	742.50	482.50	20.45	239.55
F. Kline	Billings	121	96	7/13/31	12,100	2.00	242.00		66.00	176.00
Emil Kober	Park City	444	98	11/20/30	44,400	3.50	1,554.00	750.00	8.15	795.85
Jake Kahler	Laurel	{ 400	96	1/29/31	40,000	2.75				{ 1,245.92
Jake Kahler	Laurel	{ 47	96	1/30/31	4,700	2.75	1,252.92		7.00	{ 1,245.92
Jake Kahler	Laurel	{ 17	93	7/13/31	1,581	2.25				{ 3,486.00
Levine Kober	Park City	{ 221	98	11/17/30	22,100	3.75	3,486.00			{ 3,486.00
Levine Kober	Park City	{ 1,181	98	7/13/31	118,100	2.25				{ 3,486.00
Jno. Kline	Hysam	547	96	12/ 5/30	54,700	3.25	1,777.75	1,394.50		383.25
Ed. Kater	Park City	497	96	3/ 6/31	49,700	2.25	1,118.25			1,118.25
Wm. Kober	Park City	{ 500	98	10/13/30	50,000	4.25				{ 2,970.90
Wm. Kober	Park City	{ 283	98	11/15/30	28,300	3.75	5,045.25	2,074.35		{ 2,970.90
Wm. Kober	Park City	{ 572	96	11/20/30	57,200	3.25				{ 2,970.90
R. H. Langford	Billings	375	98	9/23/30	37,500	4.50	1,687.50	937.50	52.50	697.50
G. Noble Lewis	Billings	186	92	10/13/30	17,112	4.25	578.46	400.00	42.00	136.46
G. F. Lindaner	Billings	251	98	10/29/30	25,100	4.00	1,004.00	600.00		404.00
Frank Lyle	Red Lodge	55	95	10/28/30	5,225	4.00	181.50			181.50
J. R. Lawson	Joliet	{ 185	93	10/28/30	17,205	4.00				{ 78.08
J. R. Lawson	Joliet	{ 105	96	11/13/30	10,500	3.50	626.20	848.12		{ 78.08

[14]

REPORT ON CHATTERTON & SON STORAGE BEANS

		No.	Grade	Date of Shipt. to K. C.	Net Weight	Mkt. value time of shipt.	Total net value after H. P. deduction	Cash Advances	Misc. Charges Seed, Taxes, etc.	Balance due at time of Conversion
J. Ledbetter	Joliet	120	95	1/ 9/31	11,400	3.50	339.00	200.00		139.00
J. & H. Lawson		20	95	7/13/31	1,900	2.25	32.75	30.00		2.75
Wm. Lenz	Cartersville	505	93	1/27/31	46,965	3.00	1,055.45	324.16		731.29
Ray Larimore	Billings	405	88	12/27/30	35,640	3.50	761.40	550.00	34.48	176.92
Jno. Lamey	Billings	61	96	7/13/31	6,100	2.00	122.00			122.00
McBride Bros.	Billings	352	91	10/ 1/30	32,032	4.00	964.48	700.00	5.30	259.18
J. E. McCullock	Hardin	480	96	10/31/30	48,000	3.50	1,680.00	1,080.00	48.75	551.25
David Miller	Billings	927	93	7/13/31	86,211	2.25	1,506.37		13.35	1,493.02
C. Michel	Billings	164	96	11/17/30	16,400	3.50	574.00			574.00
Ed. Mullooney	Billings	800	94	7/13/31	75,200	2.25	1,212.00	-	21.00	1,191.00
Clarence Mahler	Hardin	{150	98	10/16/30	15,000	4.25				
Clarence Mahler	Hardin	{38	98	1/22/31	3,800	3.00	751.50	300.00	49.50	402.00
Musgrave & Lyle	Billings	158	96	10/ 7/30	15,800	3.75	592.50	395.00		197.50
Musgrave & Son	Billings	185	96	10/ 7/30	18,500	3.75	693.75	462.50		231.25
Roy Newton	Billings	378	85	10/23/30	35,910	4.00	1,247.50	567.00	5.65	674.75
W. R. Peterson	Columbus	248	98	9/29/30	24,800	4.00	992.00	500.00	56.00	436.00
Dave Pitch	Crow Agency	373	91	10/17/30	33,943	4.25	1,106.87	600.00		506.87
Grover Reams	Joliet	{95	98	9/29/30	9,500	4.00				
Grover Reams	Joliet	{352	96	9/30/30	35,200	3.75	1,700.00	1,112.50	24.50	563.00
H. H. Roberts	Edgar	738	93	11/10/30	68,634	3.75	2,057.17	1,845.00		212.17
Henry Roth	Park City	{388	98	11/10/30	38,800	3.75				
Henry Roth	Park City	{398	96	11/10/30	39,800	3.50	2,848.00	1,750.00		1,098.00
Dan Rooney	Billings	519	95	7/13/31	49,305	2.25	849.86		84.00	765.00
Jno. Roth	Billings	560	98	11/22/30	56,000	3.50	1,960.00	600.00		1,360.00
R. D. Shackelford	Billings	1,206	93	7/13/31	112,158	2.25	1,679.35	800.00	110.70	683.65
Sam Sitzman		351	96	7/13/31	35,100	2.00	702.00			702.00
John Sitzman		311	98	7/13/31	31,100	2.25	699.75			699.75
Wilbur Sanderson	Billings	813	91	7/13/31	73,983	2.25	932.92		118.25	814.67
A. L. Spaeth	Laurel	248	98	1/21/31	24,800	3.00	744.00	310.00	91.25	342.75
Kate Story	Laurel	{130	98	11/10/30	13,000	3.75				
Kate Story	Laurel	{132	96	11/10/30	13,200	3.50	949.50			949.50
Snell Bros.		66	96	1/26/31	6,600	2.75	181.50			181.50
Jos. Strobbe	Pompeys P.	{252	96	1/21/31	25,200	2.75				
Jos. Strobbe	Pompeys P.	{238	92	1/22/31	21,896	3.00	1,159.48	645.00		514.48
F. W. Schaners	Laurel	519	98	7/13/31	51,900	2.25	1,167.75		100.00	1,067.75
L. Trudeau	Custer	400	98	9/24/30	40,000	4.50	1,800.00	1,050.00	14.50	735.50
										[15]
S. C. Tolliver	Billings	117	91	9/30/30	10,647	4.00	320.58	200.00		120.58
F. U. Thull	Laurel	67	98	10/29/30	6,700	4.00	268.00		59.50	208.50
Tom Ungefug	Belfry	174	96	6/ 8/31	17,400	2.00	348.00	264.55		83.45
Carl Ungefug	Belfry	{600	98	3/ 5/31	60,000	2.50				
Carl Ungefug	Belfry	{38	95	6/ 8/31	3,610	2.25	1,562.22	1,200.00	12.00	350.22
Gus Vande Veegate	Billings	{738	96	2/ 5/31	73,800	2.50				
Gus Vande Veegate	Billings	{167	93	2/ 5/31	15,531	2.25	2,155.20		10.00	2,145.20
Henry Wickman	Billings	731	94	7/13/31	68,714	2.25	1,107.46	300.00	11.75	795.71
Zaroh Wallace		125	96	7/13/31	12,500	2.00	250.00			250.00
E. Watsabaugh	Laurel	75	95	10/18/30	7,125	4.00	247.50	188.75		58.75
C. S. Wise		500	94	12/ 4/30	47,000	3.50	1,345.00	500.00	82.50	762.50
John Wagner	Park City	277	96	1/21/31	27,700	2.75	761.75	400.00	56.65	305.10
Henry Walker	Hysham	124	94	1/28/31	11,656	3.00	275.28	185.50		89.78
Jno. W. Wise		500	96	10/10/30	50,000	3.75	1,875.00	1,000.00	7.50	867.50
Jno. H. Wagner	Billings	{208	96	10/21/30	20,800	3.70				
Jno. H. Wagner	Billings	{120	96	10/31/30	12,000	3.50	1,200.00	927.50	77.00	195.50
Peter Wiegand	Hardin	395	96	11/15/30	39,500	3.50	1,377.50	250.00		1,127.50
Henry Yerger, Jr.	Laurel	122	96	2/11/31	12,200	2.50	305.00	165.00	1.90	138.10
Henry Yerger, Sr.	Laurel	194	98	12/ 1/31	19,700	3.50	689.50	250.00	3.05	436.45
Yost Bros.	Billings	568	94	7/13/31	53,392	2.25	860.52			860.52
Wm. Noteboom	Fairview	432	98	10/ 2/30	43,141	4.00	1,725.64			1,725.64
Aaron Swanson	Dore, N. D.	12	96	10/29/30	1,165	3.75	43.69			43.69
John Hardy	Fairview	88	96	3/10/31	8,817	2.25	198.38			198.38
A. M. Cooley	Sidney	81	94	3/10/31	7,607	2.50	141.67			141.67
Wm. Harrison	Savage	22	94	2/10/31	2,068	2.50	38.50			38.50
Northland Seed Co.	Sidney	{94	98	10/ 6/30	9,400	4.00	376.00			376.00
" " "	"	{8	98	10/11/30	800	4.00	32.00			32.00
" " "	"	{70	98	10/29/30	7,000	4.00	280.00			280.00
" " "	"	{77	94	3/10/31	7,238	2.50	134.75			134.75
		39,897			3,859,835		106,007.83	38,155.18	2,009.08	65,843.57

EXHIBIT C—(Continued)

77,500 lbs @	\$4.50	\$3,487.50
192,893 " "	4.25	8,197.95
415,582 " "	4.00	16,623.28
511,405 " "	3.75	19,177.69
601,212 " "	3.50	21,042.42
122,400 " "	3.25	3,978.00
144,307 " "	3.00	4,320.21
273,845 " "	2.75	7,530.74
186,913 " "	2.50	4,672.82
1,188,278 " "	2.25	26,736.25
145,500 " "	2.00	2,910.00
<hr/>		
3,859,935		\$118,685.86

Total value of beans \$118,685.86
 Less total hand pick charges 12,678.03

106,007.83

Total cash advances \$ 38,155.18
 " Misc. charges 2,009.08

Total

Advances 40,164.26

TOTAL BALANCE DUE BEAN OWNERS.....\$ 65,843.57

[17]

The Notice of Petition & Bond for Removal contained in said Transcript of Removal is in the words and figures following, to wit: [18]

[Title of Court and Cause.]

NOTICE.

To State of Montana and the Department of Agriculture of the State of Montana, Plaintiffs above named, and to Messrs. L. A. Foot, Attorney General for the State of Montana, of Helena, Montana, T. H. MacDonald, Assistant Attorney General for the State of Montana, of Helena, Montana, and Messrs. Brown, Wiggernhorn & Davis, of Billings, Montana, Attorneys for Plaintiffs above named:

You are hereby notified that the defendant in the above entitled cause is about to file in said District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, a petition that the above entitled cause be removed into the District Court of the United States, for the District of Montana, also a bond on removal to be executed by said defendant, as Principal, and by United States Fidelity & Guaranty Company, a surety company authorized to and doing business in the State of Montana, as Surety, and that said petition and bond will be presented to a judge of said District Court of the Thirteenth Judicial District of the State of Montana, in and

for the County of Yellowstone, for action thereon immediately.

Dated June 1st, 1932.

T. B. WEIR
HARRY P. BENNETT
Attorneys for Defendant.
Helena, Montana. [19]

ACKNOWLEDGMENT OF SERVICE

Due personal service of the within Notice, together with copy of each the petition and bond referred to therein, made and admitted and receipt of copy acknowledged this 1st day of June, 1932.

BROWN, WIGGENHORN
& DAVIS,
Attorneys for Plaintiffs.

Filed June 1, 1932, 2 p.m. Geo. M. Hays, Clerk of District Court; by A. W. Stow, Deputy Clerk.

[Endorsed]: Filed June 9, 1932. [20]

The PETITION FOR REMOVAL contained in said Transcript on Removal is in the words and figures following, to wit: [21]

[Title of Court and Cause.]

PETITION FOR REMOVAL

Now comes Fidelity and Deposit Company of Maryland, and by this its petition respectfully shows to the Court:

I.

That this is a civil action begun against your petitioner in this Court on the 11th day of May, 1932; that when this action was commenced the plaintiffs were, ever since have been and now are residents and citizens of the State of Montana; and this petitioning defendant was, when this action was commenced, ever since has been and now is a corporation duly incorporated under the laws of the State of Maryland, and a non-resident of the State of Montana.

That said suit is brought in the name of the State of Montana and in the name of the Department of Agriculture of the State of Montana on behalf and in the interest of numerous persons, all of whom are citizens and residents of the State of Montana, and the State of Montana has not, nor has the Department of Agriculture of the State of Montana, any interest in said suit, and said suit is not brought in behalf of either The State of Montana or the Department of Agriculture of the State of Montana. [22]

II.

That the matter and amount in dispute in this action exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

III.

That this petitioning defendant submits herewith to this Court and files a bond as provided by

the laws of the United States upon the removal of causes from State Courts to the United States Court.

WHEREFORE, Your petitioner prays that this cause be removed to the District Court of the United States, for the District of Montana, and that this Court accept this petition and said bond and proceed no further in said premises, save to cause said removal to be made.

Dated May 31st, 1932.

FIDELITY AND DEPOSIT
COMPANY OF MARY-
LAND,

By T. B. WEIR

Its Attorney, hereto duly authorized.

Petitioner.

T. B. WEIR

HARRY P. BENNETT

Attorneys for Petitioner. [23]

State of Montana,
County of Lewis and Clark.—ss.

T. B. Weir, being first duly sworn, deposes and says:

That he is one of the attorneys for Fidelity and Deposit Company of Maryland, the corporation making the foregoing petition, and makes this verification for and on behalf of said corporation for the reason that there is no officer or agent of said corporation within the County of Lewis and

Clark, State of Montana, wherein this verification is made and affiant resides; that he has read the foregoing petition and knows the contents thereof, and the matters and things therein stated are true to the best of his knowledge, information and belief.

T. B. WEIR,

Subscribed and sworn to before me this 31st day of May, 1932.

[Notarial Seal] JOHN J. MITCHKE

Notary Public for the State of Montana, residing at Helena, Montana.

My commission expires May 1st, 1933.

Due personal service of within petition for Removal made and admitted and receipt of copy acknowledged this 1st day of June, 1932.

BROWN, WIGGENHORN
& DAVIS,

Attorneys for Plaintiffs.

Filed this 1st day of June 1932 at 2 o'clock p.m. Geo. M. Hays, Clerk of District Court; by A. W. Stow, Deputy Clerk.

[Endorsed]: Filed June 9th, 1932. [24]

The BOND ON REMOVAL contained in said transcript on removal is in the words and figures following, to wit: [25]

[Title of Court and Cause.]

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:

That Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, as Principal, and United States Fidelity & Guaranty Company, a surety company authorized to and doing business within the State of Montana, as Surety, are held and firmly bound unto the State of Montana, and the Department of Agriculture of the State of Montana, plaintiffs above named, in the penal sum of Three Hundred Dollars (\$300.00) for the payment of which, well and truly to be made to said State of Montana and the Department of Agriculture of the State of Montana, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed and Sealed this 27th day of May, 1932.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT,

WHEREAS, the Fidelity and Deposit Company of Maryland, the defendant in the above action, is about to petition to the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, for the removal of a certain cause of action pending wherein said State of Montana and the Department of Agriculture of the State of Montana are

plaintiffs and Fidelity and Deposit Company of Maryland, a corporation, is defendant, to the District Court of the United States, for the District of Montana;

Now, if said Fidelity and Deposit Company of Maryland shall enter into said District Court of the United States, for the District of Montana, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if such Court [26] shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

IN WITNESS WHEREOF, the said Principal and Surety have caused these presents to be executed by their respective officers duly authorized, this 27th day of May, 1932.

[Corporate Seal] FIDELITY AND DEPOSIT
COMPANY OF MARY-
LAND

By S. T. NOLAND

Its Agent, hereto duly authorized.

PRINCIPAL.

[Corporate Seal] UNITED STATES FIDEL-
ITY & GUARANTY CO.

By DON W. JACOBUS

Its Attorney in Fact. Hereto duly authorized.

SURETY.

Approved:—ROBERT C. STRONG, Judge.

Filed this 1st day of June, 1932 at 2 o'clock p.m.
Geo. M. Hays, Clerk of District Court; by A. W.
Stow, Deputy Clerk.

[Endorsed]: Filed June 9th, 1932. [27]

The ORDER OF REMOVAL contained in said transcript on removal is in the words and figures following, to wit: [28]

[Title of Court and Cause.]

ORDER OF REMOVAL

On this 1st day of June, 1932, the above action coming on to be heard on the petition of the defendant Fidelity and Deposit Company of Maryland for removal of the said cause to the District Court of the United States, for the District of Montana, at Montana; and it appearing to me that the said defendant is entitled to have said cause removed to said Court, and that a good and sufficient bond has been filed in said action, conditioned as by the Acts of Congress provided;

NOW, THEREFORE, it is ORDERED, that the said bond be approved and that the said suit and action be, and the same is hereby, removed to the District Court of the United States, for the District of Montana, at Montana; and the Clerk of this Court is hereby authorized, ordered and directed to furnish the petitioner defendant Fidelity and Deposit Company of Maryland, a duly certi-

fied copy of the record in this cause, upon the payment of [29] the legal and customary fees for preparing said record. And this Court will proceed no further in said action, unless the same shall be remanded from the District Court of the United States, for the District of Montana, aforesaid.

Signed and passed in open Court this 1st day of June, 1932.

ROBERT C. STRONG

Judge of said Court.

COURT MINUTE ORDER OF REMOVAL

APRIL TERM

Wed. June 1st, 1932

DEPARTMENT TWO.

Court convened at 9:30 a.m. Present Hon. Robt. C. Strong, Judge presiding, and Geo. M. Hays, Clerk.

[Title of Cause.]

ORDER OF REMOVAL

The defendant having filed the petition and bond for removal of this action, to the District Court of United States for the District of Montana, and it appearing that the defendant is entitled to said removal, the Court orders that this action be removed to the District Court of the United States, for the District of Montana, and the Clerk is authorized and directed to furnish the petitioner, a certified copy of the record upon payment of the

customary fees, and this court will proceed no further in this action until the same has been remanded from the said United States District Court. Order is signed in open court.

Filed this 1st day of June 1932 at 2 o'clock p.m. Geo. M. Hays, Clerk of District Court; by A. W. Stow, Deputy Clerk.

[Endorsed]: Filed June 9, 1932. [30]

The CERTIFICATE of the CLERK of the STATE COURT contained in said transcript on removal is in the words and figures following, to wit: [31]

State of Montana,
County of Yellowstone.—ss.

I, George M. Hays, Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, do certify that the above and foregoing 26 pages do constitute and are a full, true, compared and correct copy of the record on removal in the said cause of The State of Montana, and the Department of Agriculture of the State of Montana, for the use and benefit of the holders of warehouse receipts in the public warehouse seed grain elevator of Chatterton & Son, a corporation, plaintiffs, vs. Fidelity and Deposit Company of Maryland, a corporation, defendant, being respectively the complaint, summons and return showing service on

defendant Fidelity and Deposit Company of Maryland, petition of defendant Fidelity and Deposit Company of Maryland for removal, bond on removal, defendant's demurrer to complaint, notice of filing petition for removal with acceptance of service thereon, order of removal to the District Court of the United States, for the District of Montana, and Clerk's minute entry of order of removal including approval of the bond on removal.

WITNESS my hand and the seal of said Court this 8th day of June, 1932.

[Seal]

GEORGE M. HAYS

Clerk of the District Court of the Thirteenth
Judicial District of the State of Montana,
in and for the County of Yellowstone.

[Endorsed]: Filed June 9, 1932. [32]

Thereafter, on March 9th, 1933, ANSWER was duly filed herein, in the words and figures following, to wit: [33]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant, Fidelity and Deposit Company of Maryland, and for its answer to plaintiffs' complaint herein, denies, alleges and avers as follows:

I.

Answering paragraph 1, defendant admits that Chatterton & Son was and is a corporation organized and existing under and by virtue of the laws of Michigan, and operated a warehouse at Billings, Montana, but denies that it has any knowledge or information thereof sufficient to form a belief as to the other allegations contained in said paragraph 1.

II.

Answering paragraph 2, defendant admits that it was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana. Except as hereinbefore specifically admitted, defendant denies generally each and every allegation in said paragraph 2 contained.

III.

Answering paragraph 3, defendant admits that as surety and [34] in consideration of \$100.00 premium paid, that it executed said bond Exhibit "A" to the complaint. Except as hereinbefore specifically admitted, defendant denies generally and specifically each and every allegation and all the allegations in said paragraph 3 contained.

IV.

Answering paragraph 4, defendant denies that it has any knowledge or information thereof sufficient

to form a belief as to whether or not said bond was delivered on or about the 15th day of January, 1930, or at any other time or at all, to the said agent and/or manager of said Chatterton & Son at Billings, Montana, or to any other person at said time or place or at all.

V.

Defendant denies generally and specifically each and every allegation and all the allegations in said paragraph 5 contained.

VI.

Answering paragraph 6 of plaintiffs' complaint, defendant admits that it executed its renewal certificate Exhibit "B" to the complaint, and except as hereinbefore specifically admitted, denies generally and specifically all the allegations in said paragraph 6 contained.

VII.

Answering paragraph 7, defendant admits said renewal certificate by its terms purported to continue said bond in force to July 1, 1931, but denies that it has any knowledge or information thereof sufficient to form a belief as to the other allegations in said paragraph 7 contained.

VIII.

Defendant admits the allegations of paragraph 8 of said complaint.

IX.

Answering paragraph 9 of plaintiffs' complaint, defendant denies that in the month of May, 1931, or at any other time or at all [35] said Chatterton & Son delivered said bond and/or the renewal certificate thereof to the State of Montana, and alleges the fact to be that in the month of June or July, 1931, the exact day of which to defendant is unknown, and after said Chatterton & Son had failed and become insolvent, the said Commissioner of Agriculture of the State of Montana took possession of the business of Chatterton & Son at Billings, Montana, and did find said bond and renewal certificate set forth in said complaint among the papers of said Chatterton & Son at the said office of Chatterton & Son in Billings, Montana, and did then and there take possession of said bond and renewal thereof and did take and carry said bond and renewal thereof back to the Capitol at Helena, Montana, and did then purport to file the same in the files of the office of Commissioner of Agriculture of the State of Montana at Helena, Montana, all after said Chatterton & Son had failed and become insolvent and were no longer a going concern, as the said Commissioner of Agriculture of the State of Montana then knew. Except as hereinbefore specifically admitted or denied, defendant denies each and every allegation and all the allegations in said paragraph 9 contained.

X.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in said paragraph 10 of said complaint.

XI.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in said paragraph 11 of said complaint.

XII.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in said paragraph 12 of said complaint. [36]

XIII.

Answering paragraph 13, defendant denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not there was converted by Chatterton & Son bags of beans of the number of 39,897, or any other number or at all, of the net value of \$65,843.57, or any other sum or at all. Defendant further denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not the loss to the owners of said beans alleged to have been stored with Chatterton & Son was the sum of \$40,000.00, or any other sum or at all. Except as hereinbefore specifically admitted or denied, defend-

ant denies generally each and every allegation and all the allegations in said paragraph 13 contained.

XIV.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in said paragraph 14 of said complaint.

XV.

Answering paragraph 15, defendant admits that in the month of June, 1931, the Department of Agriculture of Montana received notice of the insolvency of Chatterton & Son, and that thereafter, to-wit, on or about the 27th day of August, 1931, demand was made on defendant for payment of its bond, which payment defendant refused and still refuses to make.

Except as above admitted, defendant denies that it has any knowledge or information thereof sufficient to form a belief thereof as to the other allegations in paragraph 15 contained, and therefore denies the same.

XVI.

Answering paragraph 16, defendant admits that on or about the 6th day of December, 1930, Chatterton & Son transferred its business to Chatterton & Son, Incorporated, a foreign corporation [37] organized, existing and doing business under the laws of Kansas, but denies that it ever authorized said action by said Chatterton & Son or ever

authorized in writing or in any other way or at all the change in name of Chatterton & Son to Chatterton & Son, Incorporated, or to any other name or at all.

Except as hereinbefore specifically admitted or denied, defendant denies generally and specifically each and every allegation and all the allegations in said paragraph 16 contained.

XVII.

And save as is hereinabove specifically admitted, denied or qualified, this defendant generally denies each and every allegation and all the allegations set forth in said complaint.

And for its further and separate answer, this defendant avers:

I.

That the defendant Fidelity and Deposit Company of Maryland, at all times herein or in said complaint referred to, ever since said times and now was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana.

II.

That at all times herein or in said complaint referred to, Chatterton & Son was and is a corporation organized under and by virtue of the laws of Michigan.

III.

That on or about the 7th day of January, 1930, upon application of Chatterton & Son, the defendant herein did make, execute and deliver to Chatterton & Son, under and pursuant to Section 3589 Revised Codes of Montana, 1921, a certain warehousemen's bond to cover the storage of grain, a true copy of which bond is hereto attached, marked Exhibit "A", and by this reference made a part hereof. [38]

IV.

That said bond hereinbefore referred to was made, executed and delivered to said Chatterton & Son in order to qualify them as warehousemen engaged in the storage of grain in the State of Montana, to-wit, at Billings, Montana, during the period from January 1st, 1930, to July 1st, 1930, and under and pursuant to said laws of the State of Montana governing the regulation, supervision and licensing of warehousemen within the State of Montana receiving grain for storage, to-wit, Sections 3586 to and including 3589, Revised Codes of Montana, 1921.

V.

That although said bond was executed and delivered to said Chatterton & Son to be filed by them with the Commissioner of Agriculture of the State of Montana upon the issuance of a license by said Commissioner of Agriculture of the State of Mon-

tana authorizing said Chatterton & Son to engage in the business of warehousemen for the storage of grain in said State from said January 1st, 1930, to and including July 1st, 1930, and contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under and pursuant to the laws of the State of Montana relating to said warehousemen storing grain within said State, said bond was never delivered to nor filed with said Commissioner of Agriculture and/or State of Montana, nor was there any license issued to said Chatterton & Son to do business in the State of Montana as a warehouseman, or for any other purpose or at all, during the period of said bond.

VI.

That thereafter and on or about the 10th day of July, 1930, said defendant made, executed and delivered to Chatterton & Son its certain continuation certificate of said bond hereinbefore referred to, extending said bond from July 1st, 1930, to July 1st, 1931, a true and correct copy of which certificate is hereto attached, marked Exhibit "B", and by this reference made a part hereof. [39]

VII.

That during the said period from July 1st, 1930, to and including the month of June 1931, neither the said bond, nor the said continuing certificate had been or was filed with the Commissioner of Agriculture of the State of Montana, nor was the said Chatterton & Son issued any license to do business

in the State of Montana as a warehouseman, or for any other purpose or at all.

VIII.

That in the month of June or July 1931, the exact date of which is to defendant unknown, and after said Chatterton & Son had failed and become insolvent, the said Commissioner of Agriculture of the State of Montana took possession of the business of said Chatterton & Son at Billings, Montana, and did take from the office of said Chatterton & Son said bond and certificate of renewal, and did take and carry said bond and renewal certificate thereof back to the Capitol at Helena, Montana, and did then purport to file the same in the files of the office of the Commissioner of Agriculture of the State of Montana, at Helena, Montana, and attempt and purport to then issue an alleged license to said Chatterton & Son to do business in the State of Montana as warehousemen, all after said Chatterton & Son had failed and become insolvent and were no longer a going concern and were no longer operating or doing business in the State of Montana, as said Commissioner of Agriculture of the State of Montana then and there knew.

IX.

That Section 3589 and 3589-A, Revised Codes of Montana, 1921, provides expressly for the supervision, licensing and bonding of public warehousemen, and the rights and duties of said State of Montana and/or the Commissioner of Agriculture thereunder

conditioned upon the issuance of said license and filing of bond with the said Commissioner of Agriculture and/or the State of Montana under said statutes, and that since said Chatterton & Son were never [40] issued a license under and pursuant to said Acts and no bond was filed with said Commissioner of Agriculture and/or State of Montana as therein provided, the said State of Montana and/or Commissioner of Agriculture has no right, claim or authority under said Act or the laws of the State of Montana to make claim on this defendant or its said bond, or bring suit on said claim, or right of claim whatsoever.

And for its further and separate answer, this defendant avers:

I.

That the defendant Fidelity and Deposit Company of Maryland, at all times herein or in said complaint referred to, ever since said times and now was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana.

II.

That at all times herein or in said complaint referred to, Chatterton & Son was and is a corporation organized under and by virtue of the laws of Michigan.

III.

That on or about the 7th day of January, 1930, upon application of Chatterton & Son, the defendant herein did make, execute and deliver to Chatterton & Son, under and pursuant to Section 3589 Revised Codes of Montana, 1921, a certain warehousemen's bond to cover the storage of grain, a true copy of which bond is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

IV.

That thereafter and on or about the 10th day of July, 1930, said defendant made, executed and delivered to Chatterton & Son its [41] certain continuation certificate of said bond hereinbefore referred to, extending said bond from July 1st, 1930, to July 1st, 1931, a true and correct copy of which certificate is hereto attached, marked Exhibit "B", and by this reference made a part hereof.

V.

That said bond and renewal thereof was and is a warehouseman's bond to cover the storage of grain pursuant to Section 3589 of the Revised Codes of Montana, 1921, conditioned upon the acts and duties enjoined upon grain warehousemen by the law and for the use and benefit of and to indemnify the owners of grain stored with said warehousemen against loss.

VI.

That Sections 3592-1 and Section 3592-2 of the Revised Codes of Montana, 1921, as amended by Chapter 50 of the Session Laws of Montana of 1927, provides for the license and kind of bond to be furnished to the Commissioner of Agriculture of the State of Montana and/or the State of Montana by warehousemen handling agricultural seeds, beans, peas, as distinct from grain, etc., which is separate and distinct from the bond filed by the defendant herein and required under Section 3589 of the Revised Codes of Montana, 1921, and upon which said action herein is based.

VII.

That said claim herein is made upon said defendant by said State of Montana and Department of Agriculture of said State on behalf of owners of beans stored with said Chatterton & Son and not to indemnify owners of grain upon which said bond of said defendant and the liability thereunder was and is conditioned.

WHEREFORE, Having fully answered said complaint, said defendant prays:

1. That plaintiff take nothing by its said complaint;
2. That defendant be awarded its costs of suit herein expended.

T. B. WEIR

HARRY P. BENNETT

Attorneys for Defendant. [42]

State of Montana,
County of Lewis and Clark.—ss.

T. B. Weir, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant Fidelity and Deposit Company of Maryland, the corporation making the foregoing answer, and as such makes this verification for and on behalf of said corporation, for the reason that there is no officer of said defendant within the said County of Lewis and Clark aforesaid, wherein affiant resides; that he has read said answer and knows the contents thereof, and the matters and things therein stated are true to the best of his knowledge, information and belief.

T. B. WEIR

Subscribed and sworn to before me this 9th day of March, 1933.

[Notarial Seal] JOHN J. MITCHKE

Notary Public for the State of Montana, residing at Helena, Montana.

My Commission expires May 1st, 1933. [43]

EXHIBIT A.

[PRINTER'S NOTE: The Public Warehouseman's Bond #3591931 here set forth in the typewritten transcript is already set forth in this printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [44]

EXHIBIT B.

[PRINTER'S NOTE: The Continuation Certificate No. 5809 here set forth in the typewritten transcript is already set forth in this printed record at pages 16-17, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

Due personal service of within Answer made and admitted and receipt of copy acknowledged this 9th day of March, 1933.

BROWN, WIGGENHORN
& DAVIS,
RAYMOND T. NAGLE,
Atty. General.

By O. A. PROVOST
Attorneys for Plaintiff.

[Endorsed]: Filed March 9, 1933. [45]

Thereafter, on March 23rd, 1933, REPLY was duly filed herein, in the words and figures following, to wit: [46]

[Title of Court and Cause.]

REPLY.

Come now the plaintiffs in the above entitled action and for their reply to the answer of the defendant in said action, admit, deny and allege as follows:

I.

Deny generally and specifically all of the allegations in the further and separate answers contained in said answer and all new matter contained in said answer, save and except as the matters therein contained are alleged in the plaintiffs' complaint on file herein.

WHEREFORE having fully replied to said answer, plaintiffs renew their prayer for judgment.

RAYMOND T. NAGLE

Attorney General.

E. K. MATSON

Asst. Attorney General.

BROWN, WIGGENHORN

& DAVIS

Attorneys for Plaintiffs. [47]

State of Montana,
County of Lewis & Clark.—ss.

R. T. NAGLE, being first duly sworn deposes and says:

That he is the attorney general of the State of Montana and makes this verification as such on behalf of the state of Montana and the plaintiffs in the above entitled action; that he has read the foregoing reply and knows the contents thereof and

that the same is true to the best knowledge, information and belief of affiant.

RAYMOND T. NAGLE

Subscribed and sworn to before me this 23rd day of March, 1933.

[Seal] OSCAR A. PROVOST

Notary Public for State of Montana, residing at Helena, Montana.

My commission expires Nov. 23, 1935.

[Endorsed]: Filed March 23, 1933. [48]

Thereafter, on December 10th, 1934, MOTION FOR LEAVE TO FILE AMENDED COMPLAINT and NOTICE OF MOTION were duly filed herein, in the words and figures following, to wit: [49]

[Title of Court and Cause.]

MOTION TO AMEND COMPLAINT

Come now the plaintiffs in the above entitled action and move this Honorable Court and respectfully pray for leave to amend their complaint in the above entitled action in conformity with the engrossed copy of Amended Complaint served herewith and that said Amended Complaint, as filed herein, may supersede and supplant the complaint

now on file, and that the said cause may be transferred to the equity side of this Court.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assistant Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiff. [50]

[Title of Court and Cause.]

NOTICE OF MOTION

To the above named Defendant and to Messrs. T. B.

Weir and Harry P. Bennett, its Attorneys:

You and each of you will please take notice that the above named plaintiffs will present the hereto attached motion and move the above entitled court in conformity therewith and will ask leave to amend their complaint at the courtroom of said court in the Federal Building at, Montana, on the day of December, 1934, at the hour of ten o'clock A. M. or as soon thereafter as counsel can be heard.

Said motion is based upon the files and records of said cause.

Dated this day of December, 1934.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assistant Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 10, 1934. [51]

Thereafter, on December 21, 1934, the DEFENDANT'S OBJECTIONS to Motion to Amend Complaint were duly filed herein, in the words and figures following, to wit: [52]

[Title of Court and Cause.]

OBJECTIONS OF DEFENDANT TO MOTION
OF PLAINTIFF TO AMEND.

Comes now the defendant, Fidelity and Deposit Company of Maryland, and through its attorneys objects to the application of plaintiff herein to amend its said complaint in conformity with the copy of the amended complaint filed with the motion herein, on the grounds and for the reasons as follows:

I.

That said proposed amended complaint sets up a new, separate and independent cause of action from that in the original complaint, the said proposed amended bill of complaint changing the cause of action from one on a statutory bond liability to a suit for reformation of an instrument on the grounds of mutual mistake and the enforcement of said reformed instrument.

II.

That said proposed new cause of action set forth in said amended complaint for reformation of an instrument on the grounds of mistake is barred under and pursuant to the Statute of Limitations of the State of Montana, to-wit, Part 4 of Section

9033, Revised Codes of Montana, 1921, requiring said action to be brought within two (2) years after discovery of facts constituting the mistake, also Sec. 9032 & 9033 Revised Codes of Montana 1921. [53]

III.

That said proposed amended complaint is an attempt by plaintiff to abandon its former cause of action under Sections 3589, 3589-A and/or 3592 to 3592-9 of the Revised Codes of Montana, 1921, and the Acts of the Montana Legislative Assembly supplemental thereto and amendatory thereof, and to bring a new and independent proceeding based on the common law.

IV.

That said proposed amended complaint is an attempt to change said cause from an action at law to a bill in equity.

V.

That said application is not timely and said plaintiff is guilty of laches in that said original complaint was filed herein on or about the 12th day of May, 1932; that all pleadings by the defendant have been on file herein and said above cause has been at issue in this said Court since the 23rd day of March, 1933.

WHEREFORE, defendant prays for an order of this Court, dismissing the application of plaintiff for permission to file said amended complaint,

and that if said amended complaint is already on file herein, that the same be stricken.

Dated this 18th day of December, 1934.

T. B. WEIR,
HARRY P. BENNETT

Attorneys for Defendant, Fidelity and Deposit
Company of Maryland.

[**Endorsed**]: Filed Dec. 21, 1934. [54]

Thereafter, on March 4th, 1935, the DECISION of the Court Allowing the Filing of Amended Complaint was duly filed herein, in the words and figures following, to wit: [55]

[Title of Court and Cause.]

DECISION.

Plaintiffs moved to amend their complaint followed by objections from the defendant. Oral arguments were heard, and briefs submitted. The relief sought by the amendment is very closely connected with the principal purpose of the action, which is to recover on a bond issued by defendant to indemnify the owners of a large quantity of beans stored in the warehouse of Chatterton & Son of Billings, Montana, according to plaintiff's contention. After a careful consideration of the arguments and authorities, the Court is of the opinion that the plaintiffs should be permitted to make the amendment proposed. (28 U. S. C. A. 397, Montgomery's Manual Sec. 379). The case

of Proctor & Gamble Company v. Powelson, 288 Fed. 299, seems to be as good an authority for the plaintiffs as the defendant, under the facts alleged by the former in the original complaint and in the proposed amendment; and so far as the Court can determine from these alleged facts, the amendment does not substantially change the claim on the one hand or the defense on the other; it appears to be practically a continuation of the original cause, and therefore does not present "an entirely different cause of action, supported by testimony [56] wholly or in part different", nor disclose that "the judgment or decree to be obtained would thus rest upon entirely different pleadings and substantially different testimony." The proposed amendment does not call for "an entirely different character and subject matter of proof." The quotations are from the case above cited. In other words, there is no substantial difference in the proof called for in either instance, and as it appears to the Court, the defense would be substantially the same, and probably the same witnesses would be called on both sides, if they can be found after so great a lapse of time, which, however, the defendant should not be permitted to take advantage of, as the Court construes its authority herein.

The allegations of the plaintiffs make it appear that the bond in question was not the real contract between the parties as to the actual thing insured, and that at the time of execution thereof, the parties understood and knew that the word "beans" should

have appeared in the bond and not the word "grain", which was used in the printed form. Equity should here intervene and grant the relief sought, if such proof can be made, according to the true intent of the contracting parties.

From the list attached to the complaint it appears that a large number of bean growers in the Yellowstone Valley had stored their product with Chatterton & Son, bonded warehousemen; presumably feeling that the result of their toil was secure and well protected by Chatterton and Son under their bond against loss, issued by the defendant herein. Adherence to local rules and statutes might deprive the plaintiffs of a right to produce evidence to establish the essential facts in this case. In the furtherance of justice no local rule should be allowed to interfere, to prevent the allowance of the proposed amendment.

In view of the foregoing, plaintiffs should be permitted to amend in accordance with their motion, and it is so ordered.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Mar. 4, 1935. [57]

Thereafter, on March 4th, 1935, an AMENDED COMPLAINT was duly filed herein, in the words and figures following, to wit: [58]

[Title of Court and Cause.]

AMENDED COMPLAINT

In Equity.

Come now the plaintiffs in the above entitled action and for their amended complaint herein, for cause of action allege:

I.

That the defendant, Fidelity and Deposit Company of Maryland, now is and at all times herein mentioned was a foreign corporation organized and existing under and by virtue of the laws of the state of Maryland and authorized to do business as a surety and bonding company and to become a surety on bonds and undertakings in the state of Montana.

II.

That at all times herein mentioned Chatterton & Son was a corporation organized and existing under and by virtue of the laws of the state of Michigan and operated, and conducted a public warehouse for the storage of beans and engaged in the business of storing beans at Billings, Montana. That said corporation had never qualified under the laws of the State of Montana to do business in the State of Montana.

III.

That the said Chatterton & Son at all times herein mentioned and for a long time prior thereto was in

the business of storing, buying, selling and handling beans exclusively, operating various branches in the United States, including the said warehouse so [59] operated by it at Billings, Montana, and said Billings warehouse at all times was a warehouse for the storage of beans alone, and particularly said warehouse was not used for the storage of grain; all of which facts were at all times herein mentioned, and particularly at the time when the bond hereinafter referred to was executed as well as the time when the extension thereof was executed, well known and understood by the defendant.

IV.

That for the purpose of affording security to the owners of beans stored with said Chatterton & Son and the holders of warehouse receipts to be issued therefor, and to serve as an inducement to the owners of beans to store the same with said Chatterton & Son and so that it might advertise itself and hold itself out as operating a bonded warehouse, and in compliance with the laws of the State of Montana, the said Chatterton & Son did on or about the 7th day of January, 1930, procure from the defendant, and said defendant did then, for a valuable consideration and the payment of a substantial premium, issue, execute, deliver and make effective its certain bond and indenture in writing, in the sum of Ten Thousand Dollars, dated the same day, as surety for the said Chatterton & Son, as principal, to the State of Montana, for the benefit of all persons storing beans in the said

warehouse of Chatterton & Son at Billings, Montana; a true and correct copy of which bond and indenture in writing is hereto attached, marked "Exhibit A", hereby referred to and made a part hereof as though herein set out in full.

V.

That at the time of the issuance, execution and delivery of said bond and the renewal thereof as hereinafter recited, the said Chatterton & Son was not receiving for storage and previously thereto has never received or stored, grain in its said warehouse at [60] Billings, Montana, but beans alone, and said bond was by said Chatterton & Son sought and required only for the storage of beans, all of which was at said time well known to and understood by the defendant. That as appears from the said Exhibit A, the condition recited in said bond is in words as follows:

"NOW, THEREFORE, if the said Chatterton & Son shall indemnify the owners of grain stored in said warehouses against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture heretofore enacted or to be enacted hereafter in relating to the business of Public Warehouseman, then this obligation to be null and void, otherwise, to remain in full force and effect."

That at the time of the execution of said bond it was intended both by the said Chatterton & Son and the defendant that by the said bond the defendant would undertake and agree to indemnify the said owners of beans stored in said warehouse against the loss of said beans and would insure said persons against such loss and that the identical beans so stored by said persons in said warehouse would be returned to them upon demand and that the said Chatterton & Son would discharge all of its duties and obligations as bailee; and both said Chatterton & Son and the defendant intended that such would be the legal consequences of said bond and supposed that that was its legal effect.

VI.

That through a mutual mistake of the said Chatterton & Son and the defendant, and by the inadvertence of the said parties, the said bond did not, and does not, truly state or express the intention of the said parties in that the bond, in its said condition, referred to the owners of grain stored in said warehouse, to be indemnified, instead of the owners of beans, as was intended, and in that connection used the word "grain" [61] instead of the word "beans". That in preparing said bond the said parties mistakenly and through lack of care and attention, used a printed form, containing the word "grain" printed therein as aforesaid, which form was designed and ordinarily used for elevators and grain warehousemen and was not especially designed for a bond covering a bean warehouse; and

both of said parties, in preparing and executing said bond, failed to notice the said discrepancy and inapt language, or carelessly supposed that the word "grain" was sufficiently comprehensive to include beans within its meaning.

VII.

That plaintiff is informed and believes that sometime about December 6, 1930, the said Chatterton & Son incorporated a portion of its business, including the said Billings, Montana Branch, under the name of Chatterton & Son Inc., a corporation organized by said Chatterton & Son and a wholly owned subsidiary of said Chatterton & Son, all of the stock in which was owned by said Chatterton & Son, not under the laws of the State of Montana. That if, however, in fact there was any change in ownership, possession, title or management of said warehouse, it was not disclosed to the public and particularly not disclosed to any of the said persons who then or thereafter had beans stored in said warehouse and was a private and confidential arrangement of the said Chatterton & Son and its said subsidiary, Chatterton & Son Inc., and the officers and agents thereof, and the said warehouse continued to be operated under the name of Chatterton & Son and all warehouse receipts were issued and all business done, at all times, under the said name of Chatterton & Son. That the defendant, in writing, on the said 6th day of December, 1930, expressly consented, as surety upon said bond, to said change in name and relationship and continued

the said bond in force for the said period with the principal changed to Chatterton & Son Inc. That said Chatterton & Son Inc. likewise never qualified under the laws of Montana to do business in the state. [62]

VIII.

That at all times after the execution of said bond the said Chatterton & Son, or its successor, Chatterton & Son Inc., relied thereon and made it known to the growers and owners of beans in the agricultural territory surrounding Billings, Montana, and served by said warehouse, and particularly the holders of warehouse receipts hereinafter referred to, that a bond in form as so intended had been executed and delivered and was effective and that by its terms it afforded protection, indemnity and insurance to any and all persons storing beans in said warehouse for the return of their beans and against their loss; and advertised and represented the said warehouse so operated by it at Billings, Montana, to be a bonded warehouse, all upon the faith of said bond.

IX.

That on or about the first day of July, 1930, at the request of said Chatterton & Son and for a valuable consideration and the payment of a substantial premium and for the same purposes and ends aforementioned, and to continue the said bond in force and effect for the ensuing year, the defendant issued, executed and delivered its certain con-

tinuation certificate and indenture in writing, continuing said bond, as so intended, in force for the further term of one year, beginning on the said first day of July, 1930, whereby the said bond was continued in full force and effect and its life extended to July 1, 1931; a true copy whereof is hereto attached, marked "Exhibit B", hereby referred to and made a part hereof as though herein set out in full.

X.

That pursuant to the instructions and intentions of the defendant the said bond and continuation certificate were in due course filed with the Department of Agriculture, Labor and Industry of the State of Montana, and the same have ever since been, and now are there on file. [63]

XI.

That in reliance upon said bond and the security afforded thereby, and while the same was so in force and effective, during the period from July 1, 1930 to June 30, 1931, there was delivered for storage and stored with said Chatterton & Son or its successor, Chatterton & Son Inc., at its said warehouse at Billings, Montana, by divers and sundry residents of the state of Montana and owners of beans grown in said agricultural territory, in individual lots and at different times, a total of 39897 bags of beans of one hundred pounds each, and there was issued to each of said persons, by said Chatterton & Son, or its successor Chatterton

& Son Inc., a warehouse receipt for the identical beans so in each instance deposited for storage, by the terms of which receipts said beans were received for storage only and as a bailment.

XII.

That all of the said beans were so delivered for storage by the owners thereof without knowledge of the exact words contained in said bond and particularly without knowledge that by the precise terms of said bond it assumed to indemnify the owners of grain instead of the owners of beans, and they were lead to believe and did believe that the said bond by its express terms indemnified and protected them against loss in the storage of such beans; and in so storing said beans they relied upon the representations made to them as aforesaid concerning said bond.

XIII.

That the delivery of said beans for storage and the storage of said beans by said growers and owners, in each instance, constituted a bailment, and it became and was the duty of said Chatterton & Son, or its successor Chatterton & Son Inc., at all times to preserve the identity of each of said lots of beans so stored so as to permit the return and delivery to each owner of the identical beans so stored by him and not to [64] commingle said beans or to exercise any acts of dominion or ownership over the same or to sell or dispose of any of the same or to do any thing that would prevent

the return and delivery to the said respective owners, upon demand and surrender of warehouse receipt, of the identical beans so stored.

XIV.

That notwithstanding its duty as aforesaid, the said Chatterton & Son, or its successor Chatterton & Son Inc., upon the delivery to it of said beans, commingled the same and failed to preserve their identity. That without the knowledge of any of the owners of said beans and the holders of warehouse receipts for the same, the said Chatterton & Son, or its successor Chatterton & Son Inc., during the life of said bond, removed all of the said beans from the said warehouse and from the State of Montana, and either sold the same or otherwise converted the same to its own use, without in any way accounting for the said beans. That thereby said Chatterton & Son, and Chatterton & Son Inc. failed to faithfully perform their duties as a public warehouseman and breached the condition of said bond.

XV.

That promptly after said conversion and loss, demand was duly made upon the said Chatterton & Son and said Chatterton & Son Inc. for the said beans so stored, or their value, but that the said Chatterton & Son or the said Chatterton & Son Inc. were unable to and failed and refused to redeliver or return the said beans or any of them, and the owners of said beans have thereby suffered the full

loss of said beans and of their value. That, however, upon intervention of the Commissioner of Agriculture of the State of Montana, a portion of the loss so sustained by the owners of said beans was recovered by the said Commissioner of Agriculture. That the total value [65] of said beans so converted, after crediting thereon all money and everything else of value recovered as aforesaid, was in excess of the sum of \$40,000.00, and the net loss to said holders of warehouse receipts on account of the loss of said beans and the acts aforesaid, was in excess of the said sum of \$40,000.00 and they have been damaged in that amount.

XVI.

That on or about the 6th day of December, 1930, the defendant in writing recognized and acknowledged its liability upon said bond to the effect as in this complaint stated to be intended, and confirmed the said intention.

XVII.

That this action is brought and is being prosecuted for the benefit of all of the said owners and holders of warehouse receipts as aforesaid, and is brought and is being prosecuted by the State of Montana at their special instance and request; and the Attorney General of the State of Montana has been by them and by the said Commissioner of Agriculture requested to bring this action and to enforce the penalty of said bond. That all of the property of said Chatterton & Son and of said

Chatterton & Son Inc. and all means of recovery against them or either of them, have been exhausted, and that no part of the said net loss aforesaid has been paid.

XVIII.

That on or about the 15th day of August, 1931, the said Commissioner of Agriculture demanded payment of the defendant of the said loss to the amount of the penalty named in said bond, to-wit: the sum of \$10,000.00, but that the said defendant refused and has ever since refused to pay the same, and the same has not been paid.

WHEREFORE plaintiff prays judgment: That the said bond be reformed and corrected so as to express the true intent and meaning of the said parties, and as [66] so reformed, the said bond be enforced against the defendant, and the plaintiff be awarded judgment for the sum of \$10,000.00 with interest thereon at the rate of six per cent per annum from July 1, 1931; that plaintiff be awarded its costs of action herein expended; and for such other and further relief as may be agreeable to equity; all for the use and benefit of the said holders of warehouse receipts aforesaid.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assistant Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiffs. [67]

State of Montana,

County of Lewis and Clark.—ss.

Raymond T. Nagle, being first duly sworn, deposes and says:

That he is the attorney general of the state of Montana and makes this verification as such on behalf of the State of Montana; that he has read the foregoing complaint and knows the contents thereof and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

RAYMOND T. NAGLE

Attorney General

Subscribed and sworn to before me this 3rd day of November, 1934.

[Seal]

OSCAR A. PROVOST

Notary Public for the State of Montana, residing at Helena, Montana.

My commission expires Nov. 23, 1935.

[Endorsed]: Filed Mar. 4, 1935. [68]

EXHIBIT A.

[PRINTER'S NOTE: The Public Warehouseman's Bond #3591931, here set forth in the typewritten transcript is already set forth in this printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [69]

EXHIBIT B.

[PRINTER'S NOTE: The Continuation Certificate No. 5809 here set forth in the typewritten transcript is already set forth in this printed record at pages 16-17, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

[Endorsed]: Filed, March 4, 1935 [70]

Thereafter, on March 21st, 1935, MOTION TO DISMISS AMENDED COMPLAINT was filed herein, in the words and figures following, to wit:
[71]

[Title of Court and Cause.]

MOTION TO DISMISS.

Comes now the Fidelity and Deposit Company of Maryland, a corporation, defendant in the above entitled action, and moves the Court to dismiss the amended complaint in equity filed in said action, upon and for the following grounds and reasons:

I.

It appears from the face thereof that said amended complaint does not set forth facts sufficient to constitute a cause of action at law or in equity against said defendant.

II.

It appears from the face thereof that the amended complaint does not state facts sufficient to entitle the plaintiffs to any relief.

III.

It appears on the face of said amended complaint that the causes of complaint are stale and that so long a time has passed since the matters and things complained of took place that it would be contrary to equity and good conscience for this Court to take cognizance thereof. [72]

IV.

It appears from the face of the amended complaint herein that if plaintiffs ever had any cause of action against this defendant for reformation, as alleged in said complaint, said cause of action accrued about three (3) years before the filing of said amended complaint, as appears on the face of said bill, and is barred under and pursuant to the Statutes of Limitations of the State of Montana, and is long since barred by laches, and should not now be permitted to be asserted in a Court of Equity.

V.

It appears from said amended complaint that there is a defect of parties to said action, in that Chatterton & Son, a corporation, is not either a

party plaintiff nor a party defendant, although the complaint shows on its face that said Chatterton & Son is a necessary party to a complete determination of the action, in that it is the principal obligor in the contract of suretyship which is sought to be reformed in said amended complaint, and is one of the parties to said bond or instrument and one of the necessary and indispensable parties to be before this Court before this case can be tried.

VI.

On the face of the amended complaint it is disclosed that plaintiffs and/or the Department of Agriculture, Labor and Industry thereof, are not the real parties in interest, in that it is shown that neither the State of Montana nor the Department of Agriculture, Labor and Industry thereof, made any mistake in connection with the bond, or that there was any agreement with the State or any of its representatives that a bean warehouse bond should be executed, rather than a grain warehouse bond, nor is there any claim that the State relied upon the fact that the bond, as executed, was to cover a bean warehouse rather than a grain warehouse.

VII.

The bill of complaint does not show any vested interest in the [73] plaintiffs in the subject matter of the suit, nor any right to have the same reformed, in that it does not show that there was any mistake between the plaintiffs and defendant herein,

but that the mistake, if any there was, occurred between the principal, Chatterton & Son, and defendant.

WHEREFORE, defendant prays that the said amended complaint may be dismissed and that the said defendant may be hence dismissed with its costs in its behalf incurred, and for such other and further relief as to the Court may seem just; and it is further moved that defendant's time to answer or file any further proper pleading be extended pending the determination of the present motion.

Dated this 20th day of March, 1935.

T. B. WEIR,
HARRY P. BENNETT,
Solicitors for Defendant.

[Endorsed]: Filed March 21, 1935. [74]

Thereafter, on April 9th, 1935, a STIPULATION submitting Motion to Dismiss was filed herein, in the words and figures following, to wit: [75]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, by and between the above named plaintiffs and the above named defendant, through their respective counsel, that the Motion to Dismiss the Complaint, filed herein on behalf of the defendant,

shall be submitted upon the written memorandum of authorities in support thereof, filed by the respective parties; with twenty (20) days after Court's ruling thereon to further plead.

Dated this 6th day of April, 1935.

R. G. WIGGENHORN
Attorneys for Plaintiffs.
T. B. WEIR
HARRY P. BENNETT
Attorneys for Defendant.

[Endorsed]: Filed April 9, 1935. [76]

Thereafter, on June 17th, 1935, the ORDER of the Court Denying the Motion to Dismiss Amended Complaint was duly entered herein, in the words and figures following, to wit: [77]

[Title of Court and Cause.]

DECISION OF COURT ON MOTION TO
DISMISS.

Endorsed on back of Motion to Dismiss.

The within motion to dismiss the Amended Complaint was submitted on briefs according to Stipulation of Counsel for the respective parties. The Court has considered the Motion and briefs in connection with the Amended Complaint, and being duly advised, and good cause appearing therefor,

the said Motion is hereby denied, with ten days to answer upon receipt of notice hereof.

CHARLES N. PRAY,
Judge.

[Endorsed]: Entered June 17, 1935. [78]

Thereafter, on March 14th, 1935, Defendant's BILL OF EXCEPTIONS was duly signed, settled, allowed and filed herein, in the words and figures following, to wit: [79]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be it remembered that on the 11th day of May, 1932, the plaintiff in this cause filed in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, its complaint as follows:

[PRINTER'S NOTE: The Plaintiff's Complaint filed on the 11th day of May, 1932, here set forth in the typewritten transcript is already set forth in this printed record at pages 2-21, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [80]

That upon application of defendant, said cause was duly removed to this Court, said Transcript on

Removal, including said complaint, being filed herein on June 9th, 1932.

That thereafter and on the 9th day of March, 1933, there was duly filed herein defendant's Answer to complaint of plaintiffs, as follows:

[PRINTER'S NOTE: The Defendant's Answer filed March 9, 1933, here set forth in the typewritten transcript is already set forth in the printed record at pages 32-46, and is pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [81]

That on the 23rd day of March, 1933, plaintiff filed herein its reply to defendant's Answer, as follows:

“[Title and Cause]

REPLY.

Come now the plaintiffs in the above entitled action and for their reply to the answer of the defendant in said action, admit, deny and allege as follows:

I.

Deny generally and specifically all of the allegations in the further and separate answers contained in said answer and all new matter contained in said answer, save and except as the matters therein contained are alleged in the plaintiffs' complaint on file herein.

WHEREFORE having fully replied to said answer, plaintiffs renew their prayer for judgment.

(Verification)

RAYMOND T. NAGLE

Attorney General.

E. K. MATSON

Asst. Attorney General.

BROWN, WIGGENHORN

& DAVIS

Attorneys for Plaintiffs.”

That on December 4th, 1934, plaintiff filed its written Motion, asking leave to amend its complaint, together with Notice of Motion, as follows:

“[Title and Cause]

MOTION TO AMEND COMPLAINT.

Come now the plaintiffs in the above entitled action and move this Honorable Court and respectfully pray for leave to amend their complaint in the above entitled action in conformity with the engrossed copy of Amended Complaint served herewith and that said Amended Complaint, as filed herein, may supersede and supplant the complaint

now on file, and that the said cause may be transferred to the equity side of this Court.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assistant Attorney General

R. G. WIGGENHORN,

Attorneys for Plaintiff. [82]

[Title and Cause.]

NOTICE OF MOTION.

To the above named Defendant and to Messrs. T. B. Weir and Harry P. Bennett, its Attorneys:

You and each of you will please take notice that the above named plaintiffs will present the hereto attached motion and move the above entitled court in conformity therewith and will ask leave to amend their complaint at the courtroom of said court in the Federal Building at, Montana, on the day of December, 1934, at the hour of ten o'clock A.M. or as soon thereafter as counsel can be heard.

Said motion is based upon the files and records of said cause.

Dated this day of December, 1934.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assistant Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiffs."

and attached thereto a copy of the proposed amended complaint, to-wit:

[PRINTER'S NOTE: Plaintiff's proposed amended complaint here set forth in the typewritten transcript is already set forth in the printed record at pages 54-67, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [83]

That on December 21, 1934, defendant filed its written objections and/or motion to strike herein, as follows:

[PRINTER'S NOTE: Defendant's Objections to motion of Plaintiff to amend here set forth in the typewritten transcript is already set forth in the printed record at pages 50-52, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [84]

That thereafter by agreement of counsel this cause came on for hearing on the 27th day of December, 1934, at the City of Helena in said District, the plaintiff being represented by R. G. Wigenhorn, Esq., and defendant represented by Harry P. Bennett, Esq., wherein oral arguments were heard and thereafter briefs submitted by plaintiff and defendant and the same taken under consideration by the Court.

That thereafter and on the 4th day of March, 1935, the Court rendered the following decision and order in said cause:

[PRINTER'S NOTE: Decision of the Court here set forth in the typewritten record is already set forth in the printed record at pages 52-54, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [85]

which sustains the motion of plaintiffs and to which the defendant excepts and now presents this, its Bill of Exceptions, and asks that the same be allowed and settled.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Defendant. [87]

The undersigned attorneys for and on behalf of plaintiff in the above entitled cause, do hereby acknowledge service of the above and foregoing Bill of Exceptions this 11th day of March, 1935, and having examined the same, do agree that the same is true and correct and that the same may be allowed, settled, signed and filed and made a part of the record in said cause and do hereby waive the right to be present at the settling and allowance of said Bill of Exceptions.

RAYMOND T. NAGLE,
Atty. Genl.
ENOR K. MATSON,
Asst. Atty. Genl.
R. G. WIGGENHORN
Attorneys for Plaintiffs.

It is ordered that the above and foregoing be and the same is herewith duly signed, certified, and allowed as the bill of exceptions in said cause, and as being true and correct, and the same is hereby made a part of the record in said cause and ordered filed as such.

Done this 14th day of March, A. D. 1935.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed March 14, 1935. [88]

Thereafter, on July 1, 1935, ANSWER TO AMENDED COMPLAINT was duly filed herein, in the words and figures following, to wit: [89]

[Title of Court and Cause.]

ANSWER

Comes now the defendant, Fidelity and Deposit Company of Maryland, and for its Answer to plaintiffs' Amended Complaint in Equity herein, denies, alleges and avers as follows:

I.

Answering paragraph I, defendant admits that it was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana. Except as hereinbefore specifically admitted, de-

defendant denies generally each and every allegation in said paragraph I contained.

II.

Answering paragraph II, defendant admits that Chatterton & Son was and is a corporation organized and existing under and by virtue of the laws of Michigan, and operated a warehouse at Billings, Montana; admits that said corporation had never qualified under the laws of the State of Montana to do business in the State of Montana as a warehouseman or otherwise or at all, and in this respect alleges [90] the fact to be that said Chatterton & Son failed to file the said bond herein, or any bond, with said Commissioner of Agriculture and/or State of Montana, nor was there any license issued to said Chatterton & Son to do business in the State of Montana as a warehouseman, as provided under the Statutes and laws of said State of Montana, or for any other purpose or at all.

III.

Answering paragraph III, defendant admits that Chatterton & Son were engaged in storing, buying, selling and handling of beans, operating various branches in the United States, but specifically denies that Chatterton & Son handled beans exclusively, and in this respect alleges the fact to be that, in addition to beans, Chatterton & Son engaged in the storing, buying, selling and handling of grain, coal, building materials and other supplies over the United States; defendant further denies

that it has any knowledge or information thereof sufficient to form a belief as to whether or not said warehouse at Billings, Montana, was used for the storage of beans exclusively; and denies that it, its officers or agents knew what business said Chatterton & Son were engaged in in Montana, and in this respect allege the fact to be that said defendant understood, and particularly at the time said bond mentioned in said Complaint was executed, thought and understood that Chatterton & Son were engaged in the storing, buying and selling of grain in the said State of Montana; except as hereinbefore specifically admitted or denied, defendant denies generally each and every allegation and all the allegations in said paragraph III contained.

IV.

Answering paragraph IV, defendant admits that as surety and in consideration of a premium paid it executed said bond, Exhibit "A" to the Complaint, but denies that said bond was executed for the benefit of persons storing beans, and allege the fact to be that said bond referred to in said Complaint was executed upon written [91] application of Chatterton & Son in order to qualify them as warehousemen engaged in the storage of grain in the State of Montana, to-wit, at Billings, Montana, during the period from January 1st, 1930, to July 1st, 1930, and under and pursuant to said laws of the State of Montana governing the regulation, supervision and licensing of warehousemen within the State of Montana, receiving grain for storage,

to-wit, Sections 3586 to and including 3589, Revised Codes of Montana, 1921. Except as hereinbefore specifically admitted or denied, defendant denies generally and specifically each and every allegation and all the allegations in said paragraph IV contained.

V.

Answering paragraph V, defendant admits that said bond referred to therein contained the provision quoted in said paragraph V, but denies that at the time of the issuance and/or execution of said bond, or the renewal thereof, or at any other time or at all, the defendant intended to or did indemnify the owners of beans against loss, as in said paragraph V set forth, or otherwise or at all, and in this respect allege the fact to be that said bond and/or renewal thereof was executed with the purpose and intent of qualifying Chatterton & Son as warehousemen engaged in the storage of grain in the State of Montana and under and pursuant to said laws of the State of Montana governing the regulation, supervision and licensing of warehousemen within the said State of Montana, receiving grain for storage, to-wit, Sections 3586 to and including 3589, Revised Codes of Montana, 1921. Except as hereinbefore specifically admitted or denied, defendant denies generally each and every allegation and all the allegations in said paragraph V contained.

VI.

Answering paragraph VI, defendant admits that said bond contained the word "grain", as set forth in said paragraph VI, and that the bond was on a printed form furnished by the State of Montana, but specifically denies that the said word "grain" was mistakenly inserted [92] instead of the word "bean", and denies that the said defendant intended to write a bond covering a bean warehouse, as in said paragraph VI alleged, and in this respect alleges the fact to be that, upon written application of said Chatterton & Son, the said defendant executed a grain warehouseman's bond in order to qualify said Chatterton & Son in the State of Montana as a warehouseman engaged in the storage of grain, and that at the time of the said issuance and/or execution of said bond and/or the renewal thereof there was no authority given the State of Montana and/or the Department of Agriculture, Labor and Industry thereof, to regulate, supervise and/or license bean warehousemen in the State of Montana, and no Act regulating the licensing or supervising of the business of warehousing or storing of beans, or requiring said warehousemen storing beans to procure or furnish a bond and/or prescribing penalties for violations thereof, or fixing conditions and providing for recovery thereunder through the State of Montana and/or the Department of Agriculture, or any other person or at all, but that by an Act of the 23rd Legislative Assembly of the State of Montana, 1933, approved March 7th,

1933, and being Chapter 55 of the Session Laws of the 23rd Legislative Assembly, and after this said bond was executed and after suit had been started and complaint filed herein, there was passed an Act regulating the business of warehousing or storing of beans and requiring persons engaged in that business to procure a license and furnish a bond, and prescribing the powers and duties of the Commissioner of Agriculture thereunder; and that thereafter, under and pursuant to Chapter 164 of the Session Laws of the 24th Legislative Assembly, 1935, the Act aforesaid of 1933 was repealed and there was a new Act passed governing the licensing and regulating of the dealers engaged in buying, selling, warehousing or storing of beans, providing for the license to be issued to said warehousemen and prescribing the powers and duties of the Commissioner of Agriculture thereunder, but that at the time that the said bond and/or renewal thereof was executed and issued, as in said Amended complaint set forth, there was no intent or authority under which said defendant [93] could issue a bond to the State of Montana covering the licensing and supervision of bean warehousemen, and that at the time of the issuance and execution of said bond and renewal thereof the said defendant intended to and did issue and execute a public warehouseman's bond covering the storage of grain, and understood and believed that the said Chatterton & Son were engaged in the general grain business in the State of Montana and in the buying, selling, storing and warehousing

of same; except as hereinbefore specifically admitted or denied, defendant denies generally each and every allegation and all the allegations in said paragraph VI contained.

VII.

Answering paragraph VII, defendant denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not on or about December 6th, 1930, or at any other time or at all, the said Chatterton & Son incorporated a portion of its business, or any of its business, under the name of Chatterton & Son, Inc., and denies that it has any knowledge or information thereof sufficient to form a belief as to the other allegations in said paragraph VII contained.

VIII.

Answering paragraph VIII, defendant denies that it has any knowledge or information thereof sufficient to form a belief.

IX.

Answering paragraph IX, defendant admits that it executed its renewal certificate, Exhibit "B" to the Amended complaint, and except as hereinbefore specifically admitted, denies generally and specifically all the allegations in said paragraph IX contained.

X.

Answering paragraph X, defendant denies that said bond and/or the continuation certificate thereof

were delivered to said Department of Agriculture, Labor and Industry, of the State of Montana, as in said paragraph X alleged, and alleges the fact to be that in the [94] month of June or July, 1931, the exact day of which to defendant is unknown, and after said Chatterton & Son had failed and become insolvent, the said Commissioner of Agriculture of the State of Montana took possession of the business of Chatterton & Son at Billings, Montana, and did thereafter find said bond and renewal certificate, set forth in said complaint, among the papers of said Chatterton & Son at the said office of Chatterton & Son in Billings, Montana, and did then, or shortly thereafter, take possession of said bond and renewal thereof and did take or send said bond and renewal thereof back to the Capitol at Helena, Montana, and did then purport to file the same in the files of the office of the Commissioner of Agriculture of the State of Montana, at Helena, Montana, all after said Chatterton & Son had failed and become insolvent and were no longer a going concern, as the said Commissioner of Agriculture of the State of Montana then knew; except as hereinbefore specifically admitted or denied, defendant denies each and every allegation and all the allegations in said paragraph X contained.

XI.

Answering paragraph XI of said amended complaint, defendant denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not, during the period from July

1st, 1930, to June 30th, 1931, or at any other time or at all, there was stored with said Chatterton & Son three thousand, eight hundred and ninety-seven (3,897) bags of beans, or any other number, or at all; and defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the other allegations in said paragraph XI contained.

XII.

Answering paragraph XII, defendant denies that it has any knowledge or information thereof sufficient to form a belief.

XIII.

Answering paragraph XIII, defendant denies that it has any [95] knowledge or information thereof sufficient to form a belief.

XIV.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the information contained in said paragraph XIV of said Amended complaint.

XV.

Answering paragraph XV, defendant denies that it has any knowledge or information thereof sufficient to form a belief that there were beans converted of the value of Forty Thousand and no/100 Dollars (\$40,000.00), or any other sum or at all; defendant further denies that it has any knowledge

or information thereof sufficient to form a belief as to the other allegations in said paragraph XV contained.

XVI.

Answering paragraph XVI, defendant denies that on the 6th day of December, 1930, or at any other time or at all, said defendant, in writing, or otherwise or at all, recognized and acknowledged its liability upon this said bond, or any other bond or at all; except as hereinbefore specifically admitted or denies, defendant denies each and every allegation and all the allegations in said paragraph XVI contained.

XVII.

Answering paragraph XVII, defendant denies that it has any knowledge or information thereof sufficient to form a belief.

XVIII.

Answering paragraph XVIII, defendant admits that on or about the 15th day of August, 1931, demand was made on defendant for payment of said bond, which payment defendant refused and still refuses to make; except as above admitted, defendant denies each and every allegation and all the allegations in said paragraph XVIII contained.

And save as hereinbefore specifically admitted, denied or qualified, this defendant generally denies each and every allegation [96] and all the allegations set forth in said amended complaint.

And for its further and separate answer, this defendant avers:

I.

That the defendant, Fidelity and Deposit Company of Maryland, at all times herein or in said Amended complaint referred to, ever since said times and now, was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana.

II.

That at all times herein or in said Amended complaint referred to, Chatterton & Son was and is a corporation organized under and by virtue of the laws of Michigan.

III.

That on or about the 7th day of January, 1930, upon written application of Chatterton & Son, a true and correct copy of which application is hereto attached, marked Exhibit "A", the defendant herein did make and execute to Chatterton & Son, under and pursuant to Sections 3589, Revised Codes of Montana, 1921, a certain warehousemen's bond to cover the storage of grain, a true copy of which bond is hereto attached, marked Exhibit "B" and by this reference made a part hereof; that said bond hereinbefore referred to was made and executed to said Chatterton & Son in order to qualify

them as warehousemen engaged in the storage of grain in the State of Montana, to-wit, at Billings, Montana, during the period from January 1st, 1930, to July 1st, 1930, and under and pursuant to said laws of the State of Montana governing the regulation, supervision and licensing of warehousemen within the State of Montana receiving grain for storage, to-wit, Sections 3586 to and including 3589, Revised Codes of Montana, 1921. [97]

IV.

That although said bond was executed and delivered to said Chatterton & Son to be filed by them with the Commissioner of Agriculture of the State of Montana upon the issuance of a license by said Commissioner of Agriculture of the State of Montana authorizing said Chatterton & Son to engage in the business of warehousemen for the storage of grain in said State from said January 1st, 1930, to and including July 1st, 1930, and contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under and pursuant to the laws of the State of Montana relating to said warehousemen storing grain within said State, said bond was never delivered to nor filed with said Commissioner of Agriculture and/or State of Montana, nor was there any license issued to said Chatterton & Son to do business in the State of Montana as a warehouseman, or for any other purpose or at all, during the period of said bond.

V.

That thereafter and on or about the 10th day of July, 1930, said defendant made, executed and delivered to Chatterton & Son its certain continuation certificate of said bond hereinbefore referred to, extending said bond from July 1st, 1930, to July 1st, 1931, a true and correct copy of which certificate is hereto attached, marked Exhibit "C", and by this reference made a part hereof.

VI.

That during the said period from July 1st, 1930, to and including the month of June, 1931, neither the said bond, nor the said continuing certificate had been or was filed with the Commissioner of Agriculture of the State of Montana, nor was the said Chatterton & Son issued any license to do business in the State of Montana as a warehouseman, or for any other purpose or at all.

VII.

That in the month of June or July, 1931, the exact date of which is to defendant unknown, and after said Chatterton & Son had failed and become insolvent, the said Commissioner of Agriculture of the State of Montana took possession of the business of said [98] Chatterton & Son at Billings, Montana, and did take from the office of said Chatterton & Son said bond and certificate of renewal, and did take and carry said bond and renewal certificate thereof back to the Capitol at Helena, Mon-

tana, and did then purport to file the same in the files of the office of the Commissioner of Agriculture of the State of Montana, at Helena, Montana, and attempt and purport to then issue an alleged license to said Chatterton & Son to do business in the State of Montana as warehousemen, all after said Chatterton & Son had failed and become insolvent and were no longer a going concern and were no longer operating or doing business in the State of Montana, as said Commissioner of Agriculture of the State of Montana then and there knew.

VIII.

That Sections 3589 and 3589-A, Revised Codes of Montana, 1921, provides expressly for the supervision, licensing and bonding of public warehousemen, and the rights and duties of said State of Montana and/or the Commissioner of Agriculture thereunder, conditioned upon the issuance of said license and filing of bond with the said Commissioner of Agriculture and/or the State of Montana under said Statutes, and that since said Chatterton & Son were never issued a license under and pursuant to said Acts and no bond was filed with said Commissioner of Agriculture and/or State of Montana as therein provided, the said State of Montana and/or Commissioner of Agriculture has no right, claim or authority under said Act or the laws of the State of Montana to make claim on this defendant or its said bond, or bring suit on said claim, or right of claim whatsoever.

And for its further and separate answer, this defendant avers:

I.

That the defendant, Fidelity and Deposit Company of Maryland, at all times herein or in said Amended complaint referred to, ever since said [99] times and now, was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana.

II.

That at all times herein or in said Amended complaint referred to, Chatterton & Son was and is a corporation, organized under and by virtue of the laws of Michigan.

III.

That on or about the 7th day of January, 1930, upon application of Chatterton & Son, the defendant herein did make and execute for Chatterton & Son, under and pursuant to Section 3589, Revised Codes of Montana, 1921, a certain warehousemen's bond to cover the storage of grain, a true copy of which bond is hereto attached, marked Exhibit "B", and by this reference made a part hereof.

IV.

That thereafter and on or about the 10th day of July, 1930, said defendant made and executed for

Chatterton & Son its certain continuation certificate of said bond hereinbefore referred to, purporting to extend said bond from July 1st, 1930, to July 1st, 1931, a true and correct copy of which certificate is hereto attached, marked Exhibit "C", and by this reference made a part hereof.

V.

That said bond and renewal thereof was and is a warehouseman's bond to cover the storage of grain pursuant to Section 3589 of the Revised Codes of Montana, 1921, conditioned upon the acts and duties enjoined upon grain warehousemen by the law and for the use and benefit of and to indemnify the owners of grain stored with said warehousemen against loss.

VI.

That Sections 3592-1 and Section 3592-2 of the Revised Codes of Montana, 1921, as amended by Chapter 50 of the Session Laws of [100] Montana of 1927, provides for the license and kind of bond to be furnished to the Commissioner of Agriculture of the State of Montana and/or the State of Montana by warehousemen handling agricultural seeds, beans, peas, as distinct from grain, etc., which is separate and distinct from the bond filed by the defendant herein and required under Section 3589 of the Revised Codes of Montana, 1921, and upon which said action herein is based.

VII.

That said claim herein is made upon said defendant by said State of Montana and Department of Agriculture of said State on behalf of owners of beans stored with said Chatterton & Son and not to indemnify owners of grain upon which said bond of said defendant and the liability thereunder was and is conditioned.

WHEREFORE, having fully answered said Amended complaint, said defendant prays:

1. That plaintiffs take nothing by their said Amended complaint;
2. That defendant be awarded its costs of suit herein expended.

T. B. WEIR

HARRY P. BENNETT

Attorneys for Defendant. [101]

State of Montana

County of Lewis and Clark.—ss.

HARRY P. BENNETT, being first duly sworn, deposes and says: .

That he is one of the attorneys for the defendant, Fidelity and Deposit Company of Maryland, the corporation making the foregoing answer, and as such makes this verification for and on behalf of said corporation, for the reason that there is no officer of said defendant within the said County of Lewis and Clark aforesaid, wherein affiant re-

sides; that he has read said answer and knows the contents thereof, and the matters and things therein stated are true to the best of his knowledge, information and belief.

HARRY P. BENNETT

Subscribed and sworn to before me this 28th day of June, 1935.

[Notarial Seal] JOHN J. MITCHKE

Notary Public for the State of Montana, residing at Helena, Montana.

My commission expires May 1st, 1936.

[102]

EXHIBIT "A".

CONTRACT AND FIDELITY DEPARTMENTS
FIDELITY AND DEPOSIT COMPANY OF MARYLAND
BALTIMORE

This application is to be used: (a) for all miscellaneous bonds handled in the Contract Department, such as financial guarantees, franchise and ordinance bonds, freight charge and delivery bonds, indemnity bonds, lease bonds, lenders' and mortgagees' bonds, license and permit bonds, lien bonds, workmen's compensation bonds, supply bonds, etc., BUT NOT FOR CONSTRUCTION BONDS: and (b) for miscellaneous bonds handled in Fidelity Department, such as warehousing, compress and internal revenue bonds, and bonds of consignees, brokers, agents, etc.

Full Name of Applicant—Chatterton and Son

(If Applicant is a Partnership, give Names of all partners; if a Corporation, give Names of all Officers)

Address—Lansing, Mich. Principal Office.....

If Corporation, give State and year incorporated. State—Mich. Year.....

96 *Fidelity and Deposit Co. of Maryland vs.*

Amount of bond required,—\$10,000.00. Effective from—
January 7, 1930.

To whom given? Give exact title of individual, firm or
corporation

State of Montana

Address

State below fully the nature of the guarantee required,
and transmit copies of all agreements or important
papers pertinent to the bond applied for, as same will
facilitate action on this application.

Public Warehouseman's bond

to State of Montana

STATEMENT OF ASSETS AND LIABILITIES AS
OF

(Date)

If Corporation, give amount Capital authorized.....

Subscribed Paid in

Cash in.....Bank—— Capital Stock, if a
(Name of Bank) Corporation

“Bank—— Mortgage Bonds, if a
(Name of Bank) Corporation

“Bank——
(Name of Bank)

Cash in office.....

Stocks, Bonds, etc. Borrowed or due on
Market Value, Enu- Stocks and Bonds.....
merate (State which hypothecated)

(2)

Real Estate. (Give location and description, and appraised value of each piece).....	Borrowed or due on Real Estate. (Give amount of mortgage on each piece).....
1	1
2	2
3	3
4	4
5	5
Plant consisting of.....	Encumbrance on plant
.....
.....	Borrowed from banks. (How secured)
.....	From.....\$..... due.....
Stock of Supplies (State nature of same)	From.....\$..... due.....
.....	From.....\$..... due.....
.....
Notes Receivable. (State when due and how secured).....	Notes Payable. (How secured)
.....
Accounts Receivable. (Give dates when largest items are due)	Accounts Payable. (Give dates when largest items are payable)
.....
From.....\$..... due.....	To.....\$..... due.....
From.....\$..... due.....	To.....\$..... due.....
From.....\$..... due.....	To.....\$..... due.....
From.....\$..... due.....	To.....\$..... due.....
Other assets consisting of.....	Other liabilities consisting of
.....
Total Assets.....	Total Liabilities....

It is hereby agreed that the Depositories may confirm any inquiry made by the Company or its representatives

as to any statement made herein relative to moneys on deposit or borrowed money. [104]

1. State lines of business in which you are engaged and give particulars.....
2. Are there any law suits, judgments or liens pending against you?.....
3. Amount of liability as endorser or surety for others \$_____
4. Have you ever failed in business?.....
5. Have you arranged a bank loan for the purpose of handling this proposition?.....

(yes or no)

if so, state.....\$_____

(Name of Bank)

(Amount of Loan)

(Date It Must Be Repaid)

(Security Given Bank for Repayment)

6. If Applicant is an individual, just starting in business, or if he has been in business for himself less than five years, give names of former employers during the last 10 years, and state date of entering and date of leaving the service of such employers. (If more than one former employer, give this information in separate letter and attach same to this application)
7. If Applicant is a Warehouseman, state capacity of Warehouse or Elevator.....

GIVE BELOW THE NAMES AND ADDRESSES OF PERSONS OR CORPORATIONS ACQUAINTED WITH YOU IN A BUSINESS WAY

NAME	BUSINESS	CITY AND STREET ADDRESS

Please write names and addresses legibly.

The undersigned does or do hereby represent that the statements made herein as an inducement to the Fidelity and Deposit Company of Maryland (hereinafter called Company) to execute the bond applied for herein, are true, and, should the Company execute said bond, does or do hereby agree as follows: FIRST, to pay to the Company the premium charge of One Hundred and no/100 Dollars (\$100.00) annually in advance on the 7th day of January, in each and every year, as long as liability shall continue under said bond, or any continuation or renewal thereof, or substitute therefor (said bond or any such continuation, renewal or substitute being hereinafter referred to as said bond), and until evidence satisfactory to the Company of the termination of such liability shall be furnished to it at its home office in the City of Baltimore; SECOND, to indemnify the Company against all loss, liability, costs, damages, attorneys' fees and expenses whatever, which the Company may sustain or incur by reason of executing said bond, in making any investigation on account thereof, in prosecuting or defending any action which may be brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained; THIRD, that the Company shall have the right, and is hereby [105] authorized, but not required; (a) to adjust, settle or compromise any claim, demand, suit or judgment upon said bond, unless the undersigned shall request the Company to litigate such claim or demand or

defend such suit or to appeal from such judgment, and shall deposit with the Company collateral satisfactory to it in kind and amount; and (b) to fill up any blank or blanks left herein, and to correct any errors in filling up any such blank or blanks, it being hereby agreed that any such insertion or correction shall be prima facie correct; **FOURTH**, that in event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, attorneys' fees and expenses, claims, demands, suits and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned in any claim or suit hereunder; **FIFTH**, to waive, and does or do hereby waive, all right to claim any property, including homestead, as exempt from levy, execution, sale or other legal process under the law of any state or states; **SIXTH**, that the Company shall have the absolute right to cancel said bond in accordance with any cancellation provision therein contained, or to procure its release from said bond under any law for the release of sureties, and the Company is hereby released from any damages that may be sustained by the undersigned by reason of such cancellation or release; **SEVENTH**, that this obligation shall be for the benefit of any person or company that may join with the Company in executing said bond, or that may, at the request of the Company, exe-

cute said bond, and also for the benefit of any company or companies that may assume reinsurance upon said bond; EIGHTH, that separate suits may be brought to recover hereunder as causes of action shall accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising; NINTH, that nothing herein contained shall be construed to waive or abridge any right or remedy which the Company might have if this instrument were not executed; and TENTH, that the above agreements shall bind the undersigned and the heirs, executors, administrators, successors and assigns of the undersigned, jointly and severally.

Signed, sealed and dated this day of
....., 19.....

IF INDIVIDUAL sign here:

Witness..... (SEAL)

IF CO-PARTNERSHIP, copartnership and all co-partners sign here:

Witness..... (SEAL)

..... (SEAL)

(Individually and as a co-partner)

..... (SEAL)

(Individually and as a co-partner)

..... (SEAL)

(Individually and as a co-partner)

IF CORPORATION sign here:

CHATTERTON AND SON,
(Name of Corporation)

By H. E. CHATTERTON
President.

Attest:

A. H. Madsen. [106]

EXHIBIT B.

[PRINTER'S NOTE: The Public Warehouseman's Bond #3591931 here set forth in the typewritten transcript is already set forth in this printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [107]

EXHIBIT "C".

[PRINTER'S NOTE: The Continuation Certificate No. 5809 here set forth in the typewritten transcript is already set forth in this printed record at pages 16-17, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

[Endorsed]: Filed July 1, 1935. [108]

Thereafter, on August 3, 1935, MOTION TO STRIKE FROM ANSWER was duly filed herein,

in the words and figures following, to wit: [109]

[Title of Court and Cause.]

MOTION TO STRIKE

Come now the plaintiffs in the above entitled action and move this Honorable Court to strike from the answer of the defendant on file herein, the affirmative defenses set up therein, that is to say, both of the further and separate answers therein set forth, upon the ground that the same and all the matters therein set forth are irrelevant and immaterial and constitute no defense or defenses to the cause of action set forth in the amended complaint herein and in no way tend to defeat recovery thereon.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assist. Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 3rd, 1935. [110]

Thereafter on Aug. 3, 1935, NOTICE of Motion to Strike was filed herein, in the words and figures following, to wit: [111]

[Title of Court and Cause.]

NOTICE OF MOTION.

To the above named Defendant and to T. B. Weir and Harry P. Bennett, its Attorneys:

You and each of you will please take notice that the above named plaintiffs will present the foregoing motion and move the Court in conformity therewith at the courtroom of said Court in the Federal Building at Billings, Montana, on the first day that the said Court is sitting and holding Court at Billings, Montana, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard.

The said motion is made upon the files and records in said cause.

Dated this 18th day of July, 1935.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assistant Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiffs

Service of the foregoing Notice and Motion to Strike and receipt of a true copy thereof is hereby acknowledged the 24th day of July, 1935.

T. B. WEIR

HARRY P. BENNETT

Attorneys for Defendant.

[Endorsed]: Filed Aug. 3rd, 1935. [112]

Thereafter, on August 3, 1935, STIPULATION to submit Motion to Strike was filed herein, as follows, to wit: [113]

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY MUTUALLY STIPULATED AND AGREED BY and between counsel for the respective parties above named that the written motion of the above named plaintiffs to strike certain portions of defendant's answer in the above case may be considered as having been properly and regularly made in open Court, waiving any notice thereof, and that the same be submitted to the Court without argument, to be passed upon and disposed of by the Court at any time at chambers and its order so made and entered to be as effective and binding as though made in open Court after notice and hearing.

Dated this 24th day of July, 1935.

R. G. WIGGENHORN
Attorney for Plaintiffs
T. B. WEIR &
HARRY P. BENNETT
Attorneys for Defendant.

[Endorsed]: Filed August 3, 1935. [114]

Thereafter, on December 30th, 1935, ORDER of the Court granting Motion to Strike was duly entered herein as follows, to wit: [115]

[Title of Court and Cause.]

**ORDER OF COURT GRANTING MOTION TO
STRIKE.**

Endorsed on cover of Motion.

The within motion to strike came to the attention of this Court through Stipulation of Counsel submitting it; having considered the same and the answers of defendant it appears that both of the further and separate answers contained in the latter should be eliminated as not constituting a defense to the amended complaint. It is therefore the opinion of the Court that the aforesaid motion to strike should be granted, and it is so ordered.

CHARLES N. PRAY

Judge

[Endorsed]: Entered Dec. 30th 1935. [116]

Thereafter, on January 18th, 1936, Defendant's **BILL OF EXCEPTIONS** was duly signed, settled, allowed and filed herein, in the words and figures following, to wit: [117]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 4th day of March, 1935, the plaintiff in this cause filed in the District Court of the United States for the District of Montana, Billings Division, its amended complaint, as follows:

[PRINTER'S NOTE: Amended Complaint in Equity here set forth in the typewritten record is already set forth in the printed record at pages 54-67, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [118]

That thereafter on the 1st day of July, 1935, there was duly filed therein the defendant's answer to the plaintiffs' amended complaint, as follows:

[PRINTER'S NOTE: Answer filed July 1, 1935, here set forth in the typewritten record is already set forth in the printed record at pages 78-102, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [128]

That thereafter on the 3rd day of August, 1935, there was filed by the plaintiffs in the above cause a written notice of motion to strike, as follows:

[Title of Court and Cause.]

NOTICE OF MOTION.

To the above named Defendant and to T. B. Weir and Harry P. Bennett, its Attorneys:

You and each of you will please take notice that the above named plaintiffs will present the foregoing motion and move the Court in conformity therewith at the courtroom of said Court in the Federal Building at Billings, Montana, on the first day that the said Court is sitting and holding Court

at Billings, Montana, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard.

The said motion is made upon the files and records in said cause.

Dated this 18th day of July, 1935.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assistant Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiffs."

That thereafter on the 3rd day of August, 1935, there was made by plaintiffs in the above cause a written motion to strike, as follows:

“[Title of Court and Cause]

MOTION TO STRIKE.

Come now the plaintiffs in the above entitled action and move this Honorable Court to strike from the answer of the defendant on file herein, the affirmative defenses set up therein, that is to say, both of the further and separate answers therein set forth, upon the ground that the same and all the matters therein set forth are irrelevant and immaterial and constitute no defense or defenses to [146] the cause of action set forth in the

amended complaint herein and in no way tend to defeat recovery thereon.

RAYMOND T. NAGLE

Attorney General

ENOR K. MATSON

Assistant Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiffs.”

That thereafter on the 3rd day of August, 1935, there was made in the above cause a written stipulation, as follows:

“[Title of Court and Cause]

STIPULATION.

IT IS HEREBY MUTUALLY STIPULATED AND AGREED by and between counsel for the respective parties above named that the written motion of the above named plaintiffs to strike certain portions of defendant's answer in the above case may be considered as having been properly and regularly made in open Court, waiving any notice thereof, and that the same be submitted to the Court without argument, to be passed upon and disposed of by the Court at any time at chambers and its order so made and entered to be as

effective and binding as though made in open Court after notice and hearing.

Dated this 24th day of July, 1935.

R. G. WIGGENHORN

Attorney for Plaintiffs

T. B. WEIR,

HARRY P. BENNETT

Attorneys for Defendant.”

That thereafter the Court did, on December 30th, 1935, make the following order on the above motion, as follows:

“The within motion to strike came to the attention of the court through stipulation of counsel submitting it; having considered the same and the answer of defendant it appears that both of the further and separate answers contained in the latter should be [147] eliminated as not constituting a defense to the amended complaint. It is therefore the opinion of the court that the aforesaid motion to strike should be granted, and it is so ordered.

CHARLES N. PRAY,

Judge.”

which order sustains the motion of plaintiffs and to which the defendant excepts and now presents this, its Bill of Exceptions, and asks that the same be allowed and settled.

WEIR, CLIFT, GLOVER

& BENNETT

Attorneys for the Defendant. [148]

The undersigned attorneys, for and on behalf of plaintiffs in the above entitled case, do hereby acknowledge service of the above and foregoing Bill of Exceptions this 18th day of January, 1936, and having examined the same, do agree that the same is true and correct and that the same may be allowed, settled, signed and filed and made a part of the record in said cause, and do hereby waive the right to be present at the settling and allowance of said Bill of Exceptions.

R. G. WIGGENHORN

Attorneys for Plaintiffs.

IT IS HEREBY ORDERED that the above and foregoing be, and the same is, herewith duly signed, certified and allowed as the Bill of Exceptions in said cause and as being true and correct, and the same is hereby made a part of the record in said cause and ordered filed as such.

Done this 18th day of January, A. D., 1936.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Jan. 18, 1936. [149]

Thereafter, on January 28th, 1936, STIPULATION WAIVING TRIAL BY JURY was filed herein as follows, to wit: [150]

[Title of Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties to the above entitled action that the said action shall be tried to the Court without a jury, and that a jury therein is expressly waived.

Dated at Billings, Montana, this 28th day of January, 1936.

ENOR K. MATSON

Assistant Attorney General, State of Montana.

R. G. WIGGENHORN

Attorneys for Plaintiffs.

WEIR, CLIFT, GLOVER
& BENNETT

Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1936. [151]

Thereafter, on Jan. 28th, 1936, STIPULATION TO AMEND ANSWER to Amended Complaint was filed herein as follows, to wit: [152]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiffs above named, through their attorneys, Ralph G. Wiggen-

horn and Enor K. Matson, and the defendant, through its attorneys, Weir, Clift, Glover & Bennett, that defendant may amend its answer to the Amended Complaint by the insertion of the following clause on page 8, line 1, after the word "complaint".

"And for its further and separate answer this defendant avers:

That the said Amended Complaint herein is barred by laches and is also barred under and pursuant to the Statute of Limitations of the State of Montana, to-wit, Sections 9032 and 9033 of the Revised Codes of Montana, 1921."

Dated this 28th day of January, 1936.

ENOR K. MATSON

Assist. Attorney General

R. G. WIGGENHORN

Attorneys for Plaintiffs.

WEIR, CLIFT, GLOVER
& BENNETT.

Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1936. [153]

Thereafter, on September 10th, 1936, the DECISION OF THE COURT was duly given and filed herein in the words and figures following, to wit:

In the District Court of the United States in and
for the District of Montana.

No. 917.

THE STATE OF MONTANA, et al,

Plaintiffs,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a corporation,

Defendant.

DECISION.

This is an action to recover the sum of ten thousand dollars, named as the penalty of a surety bond issued by the defendant corporation, a surety company. The complaint also seeks the reformation of said bond by changing the word "grain", printed therein, to the word "beans".

Counsel for plaintiffs have made a fair statement of the case which the court will adopt with some modification. From August, 1929 to July, 1931, the warehouse of Chatterton & Son at Billings, Montana was operated as a branch house of the said firm, through its manager, R. J. Healow, for the storage of beans only. Each owner's beans was stored separately and marked for identification so that the same beans could be returned to him. The bond was taken out through the home office of Chatterton & Son at Lansing, Michigan, and was received by the manager at Billings, Montana, January, 1930, and the continuation certificate shortly

after its date which was July, 1930. The bond on May 12, 1931, and the continuation certificate on July 21, 1931, were both transmitted to the Commissioner of Agriculture of the State of Montana. The defendant through its agents admit that the bond as issued and through its continuation certificate was in force from January 7th, 1930 to July 1st, 1931. It was during this period that the 1930 crop of beans was received and stored in the Chatterton warehouse. [154]

The bond was written upon a printed form furnished by the Commissioner of Agriculture. On December 6th, 1930, the defendant company by an instrument in writing under seal, acknowledged that the bond was effective and that it was surety upon the bond. 39,897 sacks of beans of 100 pounds each were stored in the warehouse at Billings by 130 bean growers during the fall and winter of 1930. A warehouse receipt was issued by Chatterton & Son to each individual grower calling for delivery of the identical beans so stored to the holder of the receipt. That from September, 1930, to June, 1931, all but 12,000 sacks of said beans were shipped by Chatterton & Son from the Billings warehouse to a warehouse operated by said firm at Kansas City, Missouri, and on or about July 13th, 1931, the remaining 12,000 sacks were shipped by above firm from the Billings warehouse to their said warehouse at Kansas City, Missouri. That the identity of said beans so stored in said Billings warehouse was not preserved and the rights

and title of the owners of the beans was not honored, but the beans were, from the beginning treated by Chatterton & Son as their own, and when received in Kansas City were by Chatterton & Son sold and disposed of and the proceeds kept and not accounted for, all without the knowledge of any of the owners. That when the beans were shipped from the Billings warehouse as aforesaid, they were shipped by Chatterton & Son with the intention of disposing of them and converting them, without the consent of the owners.

That none of the owners of the beans discovered that they had been shipped and so disposed of until a few days after July 13, 1931, after the last of the beans had been shipped from the Billings warehouse. That the owners thereupon endeavored to pursue their said beans but were able to find only about 10,000 sacks, all of which had been hypothecated by Chatterton & Son and were encumbered, and all of which had been commingled and their identity could not be determined and they could not be recovered for the owners. That all marketable beans, in the nature of the business, are seed beans and [155] there are no seed beans or bean seed as such, beans being ordinarily selected for planting from any good marketable beans of the owner. When the Billings warehouse was emptied of its beans on July 13, 1931, the warehouse was closed and Chatterton & Son ceased to do business. That immediately upon discovering the defalcation of said Chatterton & Son and the loss of said beans,

demand was made by the bean growers or their representative upon Chatterton & Son for the return of said beans and honoring of said warehouse receipts or an accounting for their value, which demand was not honored and Chatterton & Son wholly failed and refused to account for any of said beans.

That after giving credit for all advances made against such stored beans and all other charges against the same, the total value of all the various lots of beans so converted by Chatterton & Son, as of the date of conversion, that is to say the date of shipment of said beans from said Billings warehouse, was the sum of \$65,843.57, which represents the total loss of the said bean growers by reason of the said wrongful acts of said Chatterton & Son in appropriating and converting said beans and failing to perform their legal duty as a warehouseman and bailee. That the total value of all said stored beans as of the date of the closing of said warehouse at Billings in July 1931, at the market price then prevailing, excluding all those lots of beans against which there had been advanced as much or more than the then prevailing market price, after allowing credit for all advances made against them and allowing all other proper credits, was the sum of \$37,260.76. The total amount recovered on behalf of the bean owners and warehouse receipt holders, recovered from Chatterton & Son from the remaining equity in 10,000 sacks of beans left unsold, cash, accounts, bills receivable and other

assets, is the sum of \$26,400.00; against which is chargeable approximately \$3,000.00 for expenses incurred in pursuit of the beans and making said recoveries, leaving a net credit against the said losses above indicated, in the sum of \$23,400.00. That the net loss remaining to [156] the bean owners and suffered by them, by reason of the defalcation of the said Chatterton & Son, reckoned upon any legal theory, is far in excess of \$10,000.00, the amount of said bond. That said loss was suffered and said cause of action accrued and the defendant became liable for the penalty of said bond when the warehouse at Billings was closed in July 1931, whereby the said breach occurred, and the defendant has been liable for the payment thereon, under its bond, since July 1931, and the same is subject to interest accordingly. That demand was promptly made upon defendant to pay and discharge its said obligation under said bond, and the same has been refused.

That all of the assets of Chatterton & Son and of its successor, Chatterton & Son, Inc., that were available and that could be reached, were paid over to the said bean owners as aforesaid, and the assets of said companies have become exhausted. That prior to the closing of said warehouse in July 1931, Chatterton & Son went in receivership and said Chatterton & Son became and is dissolved by decree of dissolution of the District Court in the State of Michigan, and since has not been an existing corporation. That a creditor's claim was filed

on behalf of said bean growers with the receiver of the assets of said Chatterton & Son, but that no recovery has been had thereon and there are no longer any assets available and no recovery can be had. That the said Chatterton & Son Inc., delivered over all of its assets, as aforesaid, to the said bean growers, and thereafter ceased to do business and has since not been a going concern. That all recourse against either Chatterton & Son or Chatterton & Son Inc., on behalf of said bean growers, has been exhausted.

The agent of the defendant company through whom this bond was negotiated and procured knew, at the time said bond was given, that Chatterton & Son were engaged exclusively in the bean business at its Billings branch and that it operated a warehouse there exclusively for the storage of beans; that said agent was and for a long time had been intimately acquainted with the nature of the business of Chatterton & Son because of long standing and intimate friendship [157] and business association with the president and other principal officers of Chatterton & Son (transcript pp. 74-79, Chatterton's deposition.)

The bond names the State of Montana as obligee "for the benefit of all parties concerned." The condition of the bond is that "Chatterton & Son shall indemnify the owners of grain stored in said warehouse against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the

State of Montana and the regulations of the Department of Agriculture.”

As it appears to the court from the testimony and circumstances of the case the bond was intended to indemnify, in case of loss, the owners of beans stored in the public warehouse of Chatterton & Son at Billings, and no question seems to have been raised at the time of issuance of this printed form of grain bond as to its inapplicability to the commodity in question, or at the time of the issuance of the certificate of continuance, and on both occasions the premium was paid and accepted by the company. In the meantime the above firm through its manager at Billings let it be known to the bean growers generally that a bond had been furnished for the protection of those who stored their beans with this firm.

Plaintiffs sue for recovery upon the common law liability under the bond, claiming that, while it appears under the definition they cited referring to beans generally as agricultural seed, governed by the Agricultural Seed Act providing for bond and license, such regulations are not controlling under the cause of action here relied upon (Session Laws, Montana, 1927, Chapter 50, Section 4). That they seek recovery under the plain language of the bond, whether or not required by statute, which was procured for the purpose of affording protection to the bean owners of the Billings district, and to insure the safety of their deposits in this warehouse.

In 85 Mont. 149, *Montana Auto Finance Corporation v. Federal Surety Co.*, the court said: "The universal rule is that in construing the bond of a surety company, acting for compensation, the contract [158] is construed most strongly against the surety, and in favor of the indemnity which the obligee has reasonable grounds to expect. Such contracts are generally regarded as contracts of insurance, and are construed most strictly against the surety." Without question that is the law and many authorities of like tenor are to be found. Such companies can not expect to take premiums and incur risks, and thereafter avoid them under the rule of strictissimi juris, and perhaps on grounds having no relation to the risk assumed, and on contracts of indemnity prepared by themselves.

It is a general principle of law that an insurer is charged with knowledge of the business of the warehouseman insured; that if the warehouseman may be held liable on the bond, the surety also is liable thereon; and such liability extends to any act of conversion on the part of the warehouseman. Here the agent had actual knowledge of the business of *Chatterton & Son. Indemnity Ins. Co.* of No. *Am. v. Archibald* (Tex) 299 S. W. 34; 67 C. J. 459, 460. In *Commercial Casualty Ins. Co. v. Lawhead*, 62 Fed. (2) 928, a bond was given to indemnify plaintiff against the loss of \$20,000.00 deposited in a bank on a time certificate of deposit. Through mistake the wrong printed form of bond was used

which covered a deposit of \$20,000.00 subject to check. The lower court held that the condition of the bond did not cover the loss, which was reversed on appeal, wherein the court said that if the bond did not secure the deposit in question then the defendant received a premium for nothing; that no doubt the parties understood the bond guaranteed the specific deposit; that the printed form used was apparently not appropriate to express the true purpose, and that the bonding company should not be allowed to escape liability because of it.

Plaintiffs reply upon the common law liability of sureties and have cited many authorities to sustain them under the facts presented in this case. The general rule is stated in 9 C. J. 27: "A statutory bond may be good as a common law obligation, although insufficient [159] under the statute because of non compliance with its requirements, provided it is entered into voluntarily and on a valid consideration and does not violate public policy or contravene any statute. But this rule can not be extended to cases in which to hold the parties liable as on a bond at common law would be to charge them with liabilities and obligations greater than, or different from, those which they assumed in the instruments executed by them. Moreover, in order to uphold a bond as a valid common-law obligation on which a recovery may be had as such, it must be done independently of the statute by the authority of which it was intended to be executed." Again in *Pue v. Wheeler*, 78 Mont. 516, the defense was

failure of consideration in this, that the bond was not filed with the clerk and was not in statutory form. In that case the court held: "If not good as a statutory undertaking, it is good as a common-law bond, to be measured by the plain wording of its terms. * * * Irregularities of procedure do not invalidate it. * * * There is no merit in the contention of lack of consideration. Defendants got that for which they executed the undertaking, return to attachment debtor of his property, and they may not complain of lack of consideration." Also see *American Surety Co. v. Butler*, 86 Mont. 584; *State to use of Benton County v. Wood*, (Ark.) 10 S. W. 599.

There seems to be no question that this action could be brought in the name of the State under the statute and authorities cited. Sec. 9067 Mont. Codes; *County of Wheatland v. Van*, 64 Mont. 113; 20 R. C. L. 665, 667; 47 C. J. 26. As the facts appear can it be said that there exists a real necessity for reforming this bond; the parties knew what commodity was intended to be covered and used the printed form contain the word "grain" to carry out their intention of insuring beans.

It does seem that a fair interpretation of the word "grain" should include beans under the testimony and circumstances surrounding the case, such for instance as the known fact that this warehouse was solely for the storage of beans. In Webster's New International [160] Dictionary the word "grain" is defined as follows: "a single small hard

seed.—collectively: a. The unhusked or the threshed seeds or fruits of various food plants, now usually, specif. the cereal grasses, but in commercial and statutory usage (as in insurance policies, trade lists, etc.) also flax, peas, sugar cane seed, etc.” It does not seem unlikely that the author would have included the word “beans” following the word “peas” if it had occurred to him at the time, and he would doubtless agree that the “etc.” in his definition included beans. However, in order to avoid any question as to the correct definition of the word and what it might finally be held to include, the court is of the opinion that the bond should be reformed and the word “beans” inserted therein in place of the word “grain”, so that the intention of the parties may be plainly expressed in the bond, and such is the order of the court.

It should appear quite evident from the foregoing that in the opinion of the court judgment for the full amount of the bond should be awarded the plaintiffs with their costs in this behalf expended, and it is so ordered.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed September 10, 1936. [161]

Thereafter, on September 19th, 1936, JUDGMENT was duly entered herein, as follows, to wit:

[162]

In the District Court of the United States, Billings Division.

THE STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR AND INDUSTRY thereof, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings, Montana,

Plaintiffs,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Defendant.

JUDGMENT.

This cause came on to be heard on the 28th day of January, 1936, and was argued by counsel; and thereupon upon consideration thereof it was ordered, adjudged and decreed, and is now ordered, adjudged and decreed, as follows, viz:

1. That the bond which is the subject of this action be and hereby is reformed by changing and substituting for the word "grain" where it appears in said bond in the condition thereof, the word "beans".

2. That the plaintiffs do have and recover of and from the defendant the sum of Thirteen Thousand One Hundred and 00/100 Dollars (\$13,100.00), lawful money of the United States of America, as

the amount of said bond with interest thereon at the rate of six per cent per annum from July 15, 1931, to the date hereof; with interest upon said sum from the date hereof at the rate of six per cent per annum.

3. That the plaintiffs recover from the defendant their costs herein expended, the same to be taxed by the Clerk of this Court, and have execution therefor. Costs \$169.60.

Judgment entered this 19th day of September, 1936.

CHARLES N. PRAY.

Judge of the above-entitled court.

[Endorsed]: Filed and entered Sept. 19th, 1936.

[163]

Thereafter, on November 30th, 1936, the Defendant's **BILL OF EXCEPTIONS** was duly signed, settled, allowed and filed herein, in the words and figures following, to wit: [164]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

BE IT REMEMBERED That this cause came on regularly for trial on the 28th day of January, 1936, at Billings, Montana, before Hon. Charles N. Pray, one of the Judges of the above entitled Court, sitting without a jury; trial by jury having been waived by stipulation of counsel. R. G. Wiggenhorn, Esq., of Billings, Montana, appeared as coun-

sel for the plaintiffs. E. K. Matson, Assistant Attorney General of the State of Montana, appeared for the State of Montana, and Harry P. Bennett, Esq., of Helena, Montana, appeared for the defendant. Upon agreement of counsel, certain amendments were made to the pleadings in the case; whereupon, the following proceedings were had:

(Opening statement by Mr. Wiggenhorn.)

(Opening statement by Mr. Bennett.)

R. J. HEALOW,

a witness called for the plaintiff, being first duly sworn, testified as follows:

(Thereupon, at the request of Mr. Wiggenhorn, exhibits for the plaintiff were marked for identification "No. 1" to "No. 18", inclusive.) [165]

My name is R. J. Healow.

Mr. BENNETT: Just a moment, if the Court please; at this point, for the purpose of the record the defendant objects to the introduction of any testimony on the ground and for the reason that the complaint fails to state a cause of action, either in law or in equity, against this defendant; on the further ground that there is a defect in the parties, both plaintiff and defendant.

The COURT: I will overrule the objection.

Mr. BENNETT: Note an exception, please.

(Testimony of R. J. Healow.)

DIRECT EXAMINATION

by Mr. WIGGENHORN.

I live here at Billings and I was local manager for Chatterton & Son from the fall, August, 1929, to July, 1931, which involved two crops. Their business was the bean business, no other business in Montana. They had a warehouse here which was used for the storage of nothing but beans, and I was the manager. I had been in the bean and bean storage business for about eight years previous to the time that I was employed by Chatterton & Son. I had been warehousing beans for the Idaho Bean and Elevator Company here in Billings. I was manager of their bean business and warehouse. I thought I knew about the bean business.

The general nature of the business of Chatterton & Son was beans entirely in Montana, and also in Kansas City. They also conducted a jobbing business, or purchased beans. We bought and cleaned beans and also stored beans and issued warehouse receipts for the beans we stored. Plaintiff's "Exhibit 4" is the printed form of warehouse receipt used by me during the time Chatterton & Son was in business here.

(Plaintiff's Exhibit 4 offered and received in evidence without objection.) [166]

(Testimony of R. J. Healow.)

EXHIBIT 4.

NEGOTIABLE WAREHOUSE RECEIPT

License No..... No.....

Date.....

RECEIVED from.....

..... Sacks Beans for Storage at.....

Gross. Wt..... Storage and Insurance 2c per cwt.

Sack Wt..... per month or fractional part thereof.

% tare..... In event beans are purchased by

Net. Wt..... other than the undersigned a hand-

Value Cwt..... ling charge of 5c per cwt. shall be

collected. All weights are subject

to natural shrinkage. Delivery to

holders of Receipts shall be as pro-

vided by the Laws of Montana.

Beans insured for benefit of owner.

CHATTERTON & SON

By

That was the printed form used by me during the time the company was engaged in business here.

The beans which are stored are kept segregated from the time they are taken in. Then they are cleaned and piled back in separate piles with a tag attached somewhere to the pile showing the number of sacks, the grade and the owners. Each individual's sacks, regardless of the number there may be, are kept piled up and kept separately during the time they are stored. It is a common practice, done in all warehouses; in fact, the growers de-

(Testimony of R. J. Healow.)

manded it. It is generally understood in the trade that that is done.

After the beans are milled they are tested. By mill, I mean cleaned or run through the mill. Then they are tested out to determine the number of discolored or unmarketable beans, and, depending on the number of discolored or off-grade beans, the grades are determined as ninety-eights, ninety-sevens or ninety-sixes, or whatever they may be. By that I mean so much per cent of the entire lot. That means a bean that grades 96% of perfect; the other 4% represents discolor or foreign material. To grade the beans, you draw off a small amount of beans from, say, every fifth sack or so in a pile, all through the pile, and after you pick those, you determine [167] the percentage of good beans. "Picking beans" means picking out the discolored beans, by a method of running them over a small picker, as we call it, and women pick out these discolored beans.

Beans have a market quotation, or market quotations from day to day. They have a market price for each grade of beans. There are about four grades. They will sell ninety-eight beans, a ninety-seven, a ninety-six, and down to a ninety-five, sometimes. It depends upon the year, and the price ranges accordingly. As a rule they require mostly ninety-sixes and ninety-eights. There are very few beans sold under that grade. If they grade less than 96%, they have to be hand-picked in order

(Testimony of R. J. Healow.)

to render them marketable. Ten cents a pound is the regular charge for picking the discolored beans that are taken out. If out of one sack of 100 pounds of beans, seven pounds are picked out—(in other words, classifying them as a 93% grade) at 10c a pound, 70c is charged against the market price for that day. That would then render the remaining beans as number one grade beans, and if the market price is \$3 on a given day and the beans grade ninety-three, or seven pounds are actually taken out, the net market value of the remaining beans would be \$2.30.

A bond was obtained for this warehouse conducted here by me. Soon after I became manager over here, I asked the Lansing office to procure a bond for the protection of the growers. That would be in the fall of 1929. The bond was issued in the early winter of 1930, about January. Plaintiff's "Exhibit 2" is the bond I now refer to. After taking the managership, I requested the Lansing office to procure a bond. I had for years previously always operated under a bond, and they replied that they would get it. That was the last I heard of it for a long time. Of course, in discussing with them many times from Kansas City and occasionally from Michigan, [168] they maintained that they would or did secure a bond as requested.

The bond came into my possession here at the Billings office some time during the winter or spring of 1930. That bond ran to July, 1930. Plaintiff's

(Testimony of R. J. Healow.)

“Exhibit 3”, which purports to be a continuation certificate of the same bonding company, continuing that bond in force for a year from July 1930 to July 1931, came into my possession shortly after the date that it bears, July 30.

Neither of these instruments was promptly filed with the Commissioner of Agriculture. The only explanation I have for this is that the bonding and business of that nature was conducted from the Lansing office, and I do not recollect of having any reason for them being returned to our office here.

Mr. WIGGENHORN: I offer Plaintiff’s Exhibit 2 in evidence.

Mr. BENNETT: If the Court please, we have admitted that this bond was executed by us; but we object to its introduction on the grounds, however, that it is incompetent, irrelevant and immaterial, in that it does not show that it was ever approved or filed with the Secretary of Agriculture or any other department of the State of Montana.

The COURT: I suppose some proof with reference to that will come later?

Mr. WIGGENHORN: Yes, Your Honor.

The COURT: As to what was done with it?

Mr. WIGGENHORN: I might say, though, that it is confessed at this time that the bond was not filed.

The COURT: Promptly?

Mr. WIGGENHORN: No; nor filed in fact before the beans were deposited. It was filed, in fact,

(Testimony of R. J. Healow.)

after the beans were deposited, with the Commissioner. In the orderly proof we will present that. [169]

The COURT: Of course, this goes to the gist of the action, and the bond will be received and considered, subject to the objection, to be ruled on later.

EXHIBIT 2.

[PRINTER'S NOTE: Exhibit 2—Public Warehouseman's Bond, No. 3591931 here set forth in the typewritten transcript is already set forth in this printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [170]

Mr. WIGGENHORN: We likewise offer Plaintiff's Exhibit 3.

Mr. BENNETT: Of course, we admit that that was executed, Your Honor; and without repeating objection, I merely want to repeat the objection is made to the original bond as going to the renewal certificate.

The COURT: And this will also be received and considered, subject to your objection.

EXHIBIT 3.

[PRINTER'S NOTE: Exhibit 3—Continuation Certificate No. 5809 here set forth in the typewritten transcript is already set forth in this printed record at pages 16-17, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

(Testimony of R. J. Healow.)

Q. At any rate, will you state now what, if any, representations or statements were made by you to customers or to persons offering beans for storage, prospective or otherwise, as to whether or not your warehouse was bonded, or whether you had such a bond? [171]

Mr. BENNETT: We are going to object to that, to that line of testimony as being clearly hearsay and not binding on this company, the defendant, in any manner and not shown to have been made in the presence of any of the parties to this action.

The COURT: Well, it seems to me just now that it would be rather material, and part of the business, or at least it would encourage or promote trade with the warehouse to show that they were bonded and that their product would be secure, if stored there.

Mr. WIGGENHORN: The theory upon which we are bringing the action, Your Honor.

The COURT: Yes, I will overrule the objection.

Mr. BENNETT: Exception.

I always maintained that we were bonded. It was always my understanding and I so represented to the growers. I communicated that generally to the growers in this territory. It would apply to anyone who asked me.

Q. Did you in fact offer it as an inducement to have growers store beans in your warehouse? [172]

Mr. BENNETT: Just a moment; we make the same objection, and on the ground of it being hear-

(Testimony of R. J. Healow.)

say testimony. And without interrupting, may I have that objection go to all this line of testimony, without repeating the objection?

The COURT: Yes; let it be understood that you object to this line of testimony, all of it, and note an exception to the ruling of the Court. And the same ruling.

A. Yes, I did. We are referring to the fall of 1930. When the bond was received by me, I imagine that I opened it and looked at it. I did not notice whether it pretended to cover "grain" or "beans." I just recognized it as being a bond.

I will explain the change that took place in the corporate nature of the business here. I am referring now to the change from Chatterton and Son to Chatterton and Son, Inc.

(It was here stipulated by counsel that Chatterton and Son changed its name to Chatterton and Son, Inc., on or about December 6, 1930 in its Kansas City branch and including the Billings branch; and also that Chatterton and Son of Lansing, Michigan, went into receivership in the fall of 1930.)

With respect to this change just stipulated to, it was made known to the growers here at Billings. It was discussed generally, and it was known. The name on the warehouse was not changed. The form of the warehouse receipt which you see signed "Chatterton and Son" was not changed. Our stationery was not changed. The only thing that

(Testimony of R. J. Healow.)

the owners of stored beans, that any change had taken place would be the rumor that that thing had been done. I don't know that the [173] rumor was prevalent or had been communicated to them. I don't remember telling any of them, but I would not be surprised if I did, but I can't remember any exact instance.

Plaintiff's Exhibit 8 is a letter written by me to the Commissioner of Agriculture of Montana. That is the letter in which the bond, Plaintiff's Exhibit 2, was transmitted to the Commissioner of Agriculture. I had always thought that it was filed, and when I discovered that it was not, I immediately sent it to the Commissioner of Agriculture. That was on or about May 12, 1931, and it has been there ever since, as far as I know.

Plaintiff's Exhibit 16 is the letter by which I transmitted Plaintiff's Exhibit 3, the continuation certificate, to the Commissioner. Apparently it had been mailed to me some time just previous to that, and this continuation certificate was mailed at this date to the Commissioner of Agriculture. I found it in my files just at this time. In this letter I said, "This should have been mailed to you a long time ago, but it was overlooked when it was received at the Billings office." That is a fact.

In Plaintiff's Exhibit 8, my letter again written to the Commissioner, I made reference to a letter just received from Dyer-Jenison-Barry Company, the agent for the Fidelity and Deposit Company of

(Testimony of R. J. Healow.)

Maryland, and enclosed a copy of that letter for the information of the Commissioner, and the next page of the exhibit purports to be a copy of that letter. That is the copy referred to in Plaintiff's Exhibit 8. It was received by me in turn from the Dyer-Jenison-Barry Company, and I transmitted it to the Commissioner.

Beans were deposited for storage by me in the fall of 1930 and the early part of 1931 in the warehouse here at Billings. The storage commenced in the month of September, 1930. They were in [174] individual lots. I kept a record showing the beans and the owners, quantity, grade, and whatever information was needed with respect to the individual beans thus stored, and those records were permanent records in my office, such that they were there when in July of the following year the warehouse was closed and taken over by the Commissioner.

As to what happened to the beans that were stored, from time to time certain lots of beans were ordered shipped to Kansas City by the Kansas City branch manager, and in response to those orders I shipped them from time to time. When I say "beans", I mean beans belonging to those various owners who had stored them. Usually consent was obtained from the growers before shipment. The manner in which consent would be obtained would be as follows: If we would be crowded for room over there, and we had a federal bonded warehouse at Kansas City and it was represented to them that

(Testimony of R. J. Healow.)

they were just as safe there in a federal bonded warehouse as they were here, and there was no objection raised in some cases; but it was not the usual procedure to first go to the individual grower whose beans were being shipped out and obtain his consent.

Shipments were made all the way from October to June of the following year, from October 1930 to June 1931. I kept in my records likewise the dates of those shipments as they were made. It would all be available in my records, which were afterwards turned over to Mr. Lindsay, the accountant. I helped him make that accounting, giving him the benefit of my knowledge.

A warehouse receipt was issued for each one of these lots of beans received from the growers. As manager, I had access to market prices and kept informed on market prices from day to day, and particularly on the dates of shipments. These market prices were in truth the market prices for those days. My records also establish these prices. [175]

I have had about ten years' experience in the bean business. We got the market from Kansas City by wire or telephone; by that I mean our Kansas City main office. Chatterton and Son maintained a terminal warehouse there. They had access to the markets and could determine the exact market quoted for that day. I got that information by wire from that office, or by telephone. I kept in constant touch and communication so that I would

(Testimony of R. J. Healow.)

be informed of the market price. It was necessary that I know that to be informed on my buying.

The market price when the season first opened in September 1930 was slightly above 5c a pound, or about \$5 a sack. There are 100 pounds in a sack. The price declined thereafter steadily, clear down to the spring of 1931. When this warehouse was closed in the spring of 1931, the price was about \$2.25 a hundred for cleaned beans. The differential between the number one, or 98% bean, and the number two, or 96% bean, was 20c or 25c a hundred.

In July 1931 I was relieved of the management by orders of Chatterton and Son of Kansas City. An auditor from Kansas City relieved me. His name was Calkins. They took over all the books and bank accounts, the signing of the checks and the management in general. I was relieved entirely about the second of July.

There were about 12,000 sacks of beans on hand at that time. They shipped them out to Kansas City just as fast as they could load them, and even loaded at night, until they were all loaded. There were a few cull beans and stuff of that kind left here. None of the growers could have learned that those beans were being shipped in this hasty manner until they were gone. The cars were ordered without my knowledge, or the knowledge of anyone that had been connected here. They asked me to go to Hysham and Miles City to [176] close up a

(Testimony of R. J. Healow.)

couple of small deals that they had down there, and while I was gone they loaded these all out. It took about two days and a night to load out these 12,000 sacks.

My records also show the advances, if any, that were made against some of these beans. In some cases advances were made and in others, none.

I do not know what was done with the beans after they arrived in Kansas City.

The growers assembled shortly after they were notified that the beans had been shipped out. I conveyed such information to them. As soon as I learned they were gone, I went to three or four growers and telephoned others. There was a meeting after that. We were not able to deliver in Billings the beans represented by the warehouse receipts after they had gone out.

I engaged in the bean business after closing this warehouse. I have been and probably still am conversant with the bean business and market price of beans. About \$2.80, I think, is the highest market we have had on number one beans since July 1931. That was about a year ago, in September 1934.

After the beans were shipped to Kansas City I do not know what disposition was made of them. None of the owners of the beans ever authorized me or the company, or consented to the sale or other disposition of the beans after they were shipped. As the manager of this company, I was the only

(Testimony of R. J. Healow.)

person with whom these growers or owners could deal with respect to their beans. To my knowledge, none of the growers or owners ever authorized in any other manner, or consented to the sale or the disposition of the beans after they reached Kansas City.

Any good number one bean is o.k. to use for seed purposes. They usually want *to selected* from a lot that has been heavy [177] producers and a good, clear, marketable bean. Any good marketable bean can be used for a seed bean. There are no seed beans as such in a separate category.

CROSS EXAMINATION

By Mr. BENNETT.

I engaged in the bean business in 1929. I started to work for Chatterton and Son in 1929. I was their manager in Montana. We bought some in Wyoming. The buyers in the Wyoming district were under my supervision. Prior to my coming with Chatterton and Son, I had been engaged in a similar line of business with the Idaho Bean and Elevator Company, operating in this territory. Outside of this Idaho company, I did not work for any other company as manager of their warehouse. I had previously gotten bonds in a similar line of business, for this Idaho company.

Q. And did you at any time during your work for any companies other than Chatterton and Son

(Testimony of R. J. Healow.)

ever make application for license to do business as a public warehouseman?

Mr. WIGGENHORN: Object to that as immaterial.

The COURT: Wasn't that stricken out of the pleadings; wasn't that set up in a separate and distinct answer that I sustained a motion to?

Mr. WIGGENHORN: That is correct.

The COURT: Well, I will sustain the objection.

Mr. BENNETT: Note an exception.

Q. Will you state, if you know, Mr. Healow, whether or not you made application in the State of Wyoming for Chatterton and Son to do business under the laws of the State of Wyoming?

Mr. WIGGENHORN: The same objection, immaterial.

The COURT: The same ruling. [178]

Mr. BENNETT: Note an exception. If the Court please, I was just following this as a matter of clearing myself on this. This man testified that he asked for Chatterton and Son to secure a bond because it had been his practice in the past, and I wanted to ask him about that, where and when he had done that.

The COURT: Yes. Well, you have. He said he got a bond for a certain purpose.

When I came to work for Chatterton and Son, I was not familiar with their business outside Montana. In 1929, or after 1929, I did not buy any hay,

(Testimony of R. J. Healow.)

grain or other products on behalf of Chatterton and Son.

We got some of our stationery from Kansas City and had some of it printed here. In the year 1929 I did not hold myself out as Chatterton and Son by letters or advertisements to show that we were engaged in the business of handling beans, hay, grain and produce.

(Mr. Bennett asked to have the seal broken on a deposition.)

That is my signature on a letter written by me on December 17, 1929, which is attached to Defendant's Exhibit C, the deposition of Austin Jenison. I notice on the top of that letter that it reads "Chatterton & Son, Beans, Grain, Hay and Produce." That stationery was sent us from Michigan. When I went to work for them, I did not know that they were engaged in the grain business outside of Montana. Later on I knew that, according to their stationery.

I wrote to Chatterton and Son's main office asking that they procure a bond. Some time later I also wrote the agents of the Fidelity and Deposit Company of Maryland. The original bond, of [179] which we have been talking, was received by me in January, 1930.

Chatterton and Son, besides engaging in the storage of beans, also bought beans, and when we bought them we paid for them. After these beans were purchased, they were shipped on instructions from

(Testimony of R. J. Healow.)

Kansas City. Sometimes these beans were held in the warehouse. The beans that we purchased outright were kept segregated, and had the names of the men from whom they were purchased on them.

In the spring of 1931, there were some rumors that Chatterton and Son were in a rather bad condition. We had often talked this over with the Secretary of Agriculture during the year, and during the spring of 1931 inquiry was made by the department as to whether or not I thought we came under the laws of the State of Montana. In March or April, 1931, a meeting was held by the various members of the concerns handling beans in reference to the matter of coming under the laws of the State. Prior to that time, I did not know that it was necessary to have a license from the state, but I always figured that we should be bonded. My knowledge as to why the bond should be filed was as a protection to the growers.

(Defendant's Exhibits 19, 20, 21 and 22 were marked for identification.)

That is my signature on Defendant's Exhibit 19. It is also my signature on Defendant's Exhibit No. 20.

Q. Do you remember, Mr. Healow, calling your attention to Defendant's exhibits 21 and 22, whether or not those letters were written in response to those letters?

Mr. WIGGENHORN: If that is the fact, I will admit it, Mr. Bennett.

(Testimony of R. J. Healow.)

A. Yes, they are letters that were written.

Mr. BENNETT: I believe it is correct that we are stipulating as to the copies, that we can introduce those; that there will be no objection as to that? [180]

Mr. WIGGENHORN: That is correct.

Mr. BENNETT: I now offer Defendant's Exhibits 19, 20, 21 and 22 in evidence.

Mr. WIGGENHORN: No objection.

The COURT: You might tell me what the purport of the letters is.

Mr. BENNETT: The purport of those letters is an inquiry from the Department of Grain and Standards of the State of Montana, of the Department of Agriculture, sending a copy of the warehouse act, and asking Mr. Healow, on behalf of Chatterton and Son, whether or not they believed that they came under that act; and Mr. Healow's letters in reference to that, saying that he would take it up with his company and also that he would call a meeting of the bean dealers the coming week to reach some understanding and make definite recommendation. Merely the matter in our case that they were at that time attempting to come under the laws of the State of Montana.

Mr. WIGGENHORN: In view of the statement, I would like to register a formal objection now to the introduction of these exhibits for that purpose announced. If that be the avowed purpose, I think I should object to them as immaterial for that purpose.

(Testimony of R. J. Healow.)

The COURT: Very well; then let them be received then, subject to that objection, if they are offered for that purpose. [181]

EXHIBIT 19

CHATTERTON & SON

Largest Bean Dealers in the World

BILLINGS, MONTANA

R. J. Healow

Mont. & Wyo. Mgr.

March 26, 1931

Dept. of Agriculture, Labor and Industry,
Helena, Montana.

Attention: Mr. A. H. Stafford,

Gentlemen:

In reply to your letter of March 19th pertaining to the enforcement of the agricultural seed and warehouse act.

Practically all of the companies handling beans in Billings are branches of larger companies with main offices in different points in the east. The subject under discussion will be taken up with the general offices as I have asked each local manager to take this matter up with their company so we might have something definite to work on at our next meeting.

I was pleased to receive a letter from the president of our company this morning in which he expressed himself as being very much in favor of having the bean business come under the jurisdic-

(Testimony of R. J. Healow.)

tion of the state commissioner of Agriculture. He said your office would have our fullest cooperation in attempting to work out a plausible system of handling beans in the state of Montana. He also stated he would like to see this same thing done in the states of Idaho, Wyoming and Colorado. I believe some action should be taken to have the system standardized in these four states.

I will call another meeting of the bean dealers this coming week to try to reach some definite understanding to recommend to the commissioner of Agriculture. In the meantime we will secure our bond and apply for license, also furnish you with a list of storage tickets showing the amount of advances on the same.

If there is anything further you wish to have brought before this meeting we will be glad to *here* from you.

Yours very truly,

CHATTERTON & SON

RJH:BH (Signed) R. J. HEALOW

(Testimony of R. J. Healow.)

EXHIBIT 20

CHATTERTON & SON

Largest Bean Dealers in the World

BILLINGS, MONTANA

R. J. Healow

April 3, 1931

Mont. & Wyo. Mgr.

Department of Agriculture,
Helena, Montana

Dear Mrs. Morris:

This will acknowledge receipt of your letter of March 31st. Accordingly, we will secure a ten thousand dollar bond as requested in your letter. [182]

We are also taking up the matter of the report from the warehouse at Kansas City, which we will forward to you upon receipt of same.

A meeting of the bean dealers of Billings was held last night. You will be getting a report of this meeting from the Secretary of the Dealers Association. I will also write you in a few days on some matters pertaining to what I think should be done. I wish to give this matter some further thought so whatever action we may take, will be to the best interest of all concerned.

Yours very truly,

CHATTERTON & SON, INC.

R. J. HEALOW

(Signed)

RJH:BH

(Testimony of R. J. Healow.)

EXHIBIT 21

COPY

March 5, 1931

Chatterton and Son,
North 28th Street,
Billings, Montana.

Gentlemen:

We are inclosing a copy of the Agricultural Seed Warehouse Act, and kindly ask that you read it carefully and notify us as to whether or not it covers your operations. You will note that it provides that all firms receiving agricultural seeds of any kind for storage for the public must give a bond to the State of Montana and make application for license. The term agricultural seed is defined in Section 4 and in Section 7 it provides that the warehousemen must return to the holder of the receipt the identical agricultural seed so placed in said warehouse for storage. There are a number of seed warehouses in Billings operating under this Act.

Very truly yours,

Chief—Division of Grain
Standards & Marketing

TM:C

(Testimony of R. J. Healow.)

EXHIBIT 22

COPY

March 19, 1931

B. J. Healo, Manager,
Chatterton and Son,
Billings, Montana.

After the meeting held with you in Billings Monday pertaining to enforcement of the agricultural seed warehouse act, Mr. Stafford and I have decided to ask those companies coming under the act to furnish the State of Montana with a \$10,000 surety bond effective April 1, 1931 and maturing on the first day of July, 1932. The [183] act as you know covers only those companies who store agricultural seeds for the public and it is our interpretation that agricultural seeds include commercial beans. In furnishing bond have your bonding company use the form inclosed and write in the bond that same is to cover the storage of beans or whatever commodity you are handling in agricultural seeds as well as grain. In sending in the bond please inclose \$20.00 to pay for license and filing fees and this license will cover you up to July 1, 1932.

It is necessary that we have a list of the storage tickets you have issued and which are in the hands of the farmers and if there are advances against the tickets we would also like this information. We also demand that where storage tickets are out-

(Testimony of R. J. Healow.)

standing that the identical seed be held in storage in Billings to protect same. I trust that before a new crop year we will be able to get together and work out a uniform storage ticket and regulations satisfactory to all dealers.

If you do not come under this Act I would appreciate an expression from you to this effect in order that our files may be cleared.

Thanking you kindly for your cooperation, I am

Very truly yours,

Chief—Division of Grain
Standards and Marketing

Q. Mr. Healow, did you have any insurance on those beans that you had stored in the warehouse?

A. Did we carry insurance?

Q. Yes; that is, Chatterton and Son?

A. Yes, sir.

Q. With what company?

Mr. WIGGENHORN: Object to that as immaterial.

The COURT: Sustained.

Mr. BENNETT: Exception.

We had made advances on some of the beans in the warehouse. Plaintiff's Exhibit 4, which is a warehouse receipt signed by Chatterton and Son, says, "Deliveries of the beans to holders of receipts shall be as provided by the laws of the State of

(Testimony of R. J. Healow.)

Montana." We delivered some of these beans back to the growers.

Q. Was that your common practice? [184]

Mr. WIGGENHORN: Objected to as immaterial, not in any way tending to prove or disprove any of the issues in this case.

The COURT: Well, I don't see what the point could be.

Mr. BENNETT: If the Court please, there was some testimony this morning that these beans belonged to these particular owners and that they were stored in the warehouse. I want to show that as a matter of fact they were delivered there to be shipped on the market as Chatterton and Son saw fit; and it is very important, if the Court please, because under this Agricultural Seed Act that we are referring to, some of this evidence will show that the department did not figure that any of these warehousemen came under the act of the State of Montana unless they were required to deliver the identical bean back to the owners or receipt holders.

Mr. WIGGENHORN: Counsel is talking about a matter that is for the Court to determine, and as far as the question goes, obviously what conclusion of law this witness might reach would not determine. It would all depend on what orders were given in each instance and the interpretation the Court makes of that warehouse receipt. Furthermore, we are not bound by the interpretation the Commissioner of Agriculture might put upon the

(Testimony of R. J. Healow.)

matter. The Court will decide what was the actual relationship of the parties. [185]

The COURT: What was the question?

(Question read.)

The COURT: Well, I will allow him to answer the question.

Mr. WIGGENHORN: Note an exception.

The COURT: Was that your common practice?

A. If they came and asked for their beans, they got them. They were there. It so states, right in the warehouse receipt.

Plaintiff's Exhibit 4 says, "In event beans are purchased by other than the consignee"—that gives them the privilege of selling them to someone else if they want to—"a handling price of 5c a hundred shall be charged." They could take them out and sell them to someone else, but there was a handling charge. We did not sell the beans for the holders of the warehouse receipts, but I would first buy their beans and then sell them.

Q. And when you made an advance, that was a part of the purchase price, was it not?

Mr. WIGGENHORN: Objected to as a conclusion and not showing the relation in the contract.

The COURT: Well, were these contracts or receipts all the same?

Mr. WIGGENHORN: Yes; he has so testified, Your Honor; universally the receipts were the same.

The COURT: What was that question, again?

(Question and objection read.)

(Testimony of R. J. Healow.)

The COURT: Well, he may say what he advanced; whether it was a part of the purchase price or not. He would know that.

Mr. WIGGENHORN: Exception. [186]

When we made an advance that was not part of the purchase price, it was simply an advance.

Q. What I am trying to get at, Mr. Healow, without being technical, is when you had made an advance on those beans and when you shipped them or sold them, if you did, you arranged with the warehouse receipt holder to pay him for his beans, is that correct?

Mr. WIGGENHORN: Just a minute, if Your Honor please? The testimony, first, is that he did not sell them; that no orders were given to sell them, and we object to the question and all of this line of questioning as immaterial.

The COURT: Sustain the objection.

Mr. BENNETT: Exception.

I shipped beans out of this warehouse to the Kansas City plant and, when I did, I made the same arrangements with the holders of the warehouse receipts as if they were stored here; they were still their beans if they were not bought.

Q. And when they were received down in the Kansas City warehouse, they were held there for the benefit of the warehouse receipt holders, is that the case?

Mr. WIGGENHORN: Object to that as calling for a conclusion and as incompetent, as the witness has not shown himself qualified to answer.

(Testimony of R. J. Healow.)

The COURT: I think so. Sustain the objection.

Mr. BENNETT: Note an exception.

Q. As a matter of fact, Mr. Healow, Chatterton and Son stored these beans for the warehouse receipt holders until such time as the market was right, and then sold them as agents of the holders of the warehouse receipts, is that correct?

Mr. WIGGENHORN: Objected to as calling for a conclusion and not the best evidence, and contradictory to the evidence. [187]

The COURT: Yes, sustain the objection.

Mr. BENNETT: Note an exception.

The beans were taken out of the warehouse and shipped from some time in the fall of 1930 up to and including July 1931, with my knowledge. They were sent to Kansas City. That is as far as I have any knowledge about the beans. I was relieved of my position as manager in July 1931. The warehouse was being emptied of beans in the middle of July, about the sixteenth or seventeenth. The warehouse was practically empty in three days.

It is correct I represented to some of the bean growers that I had a bond. There was also a federal bonded warehouse in Kansas City. I don't know the requirements necessary to qualify a bonded warehouse. I do know some of the federal requirements. I didn't know there were any requirements for a state bonded warehouse.

Q. You didn't know that an application was necessary?

(Testimony of R. J. Healow.)

Mr. WIGGENHORN: Objected to again, Your Honor, as immaterial.

The COURT: Yes, sustain the objection.

Mr. BENNETT: Note an exception. That is all.

REDIRECT EXAMINATION

By Mr. WIGGENHORN.

Plaintiff's exhibit marked for identification "Exhibit D" attached to the deposition of Mr. Jenison, which purports to be a letter, has for a letter head "Chatterton and Son" and under that "Largest Bean Dealers in the World." There is nothing there in regard to any other commodity that might be handled by Chatterton and Son. That is the letter that is signed by me and addressed to Dyer-Jenison-Barry Company, the representatives of the bonding company. This last mentioned letter head was the one I used almost exclusively. It was printed here in Billings. The legend "Largest Bean Dealers in the World" was what they represented themselves to be. [188]

In the warehouse receipt the blank "Gross Wt." would show the total poundage of beans, and the blank "Sack Wt." means that if they were taken in on an uncleaned basis, the weight of the sack, one pound per sack, would be deducted from the total. The blank "% Tare" means the dockage was—if they were in the dirt, it would represent the tare. It states right on there, if they were cleaned beans, we would use the net weight down here below.

(Testimony of R. J. Healow.)

Here in this old warehouse receipt exhibited to me the word "tare" is marked out and "98% Grade" is marked in it. That is to say, we designated the beans as to the grades. The warehouse receipt would, when the grade was established, show what it was. The blank "Received From" would show the owner of the beans, and the number of sacks would be filled in in its appropriate blank. "Storage at" would read "Billings". They were all stored here.

RECROSS-EXAMINATION

By Mr. BENNETT.

I got this bond for the protection of the storage holders.

Q. But you realized, or thought at the time that you were getting it, that it was necessary to be filed in the State of Montana in order to do business, did you not?

Mr. WIGGENHORN: I object to that as immaterial.

The COURT: Sustain the objection.

Mr. BENNETT: Note an exception.

The COURT: He has already gone into that, hasn't he? He said he got it, in direct testimony, for the protection of the bean owners.

Mr. BENNETT: Well, I believe, if I might show, that this man will say that those were procured to file with the State of Montana. [189]

(Testimony of R. J. Healow.)

That is my signature on Plaintiff's Exhibit 16, and in the second paragraph it says: "This should have been mailed to you a long time ago, but it was overlooked when it was received at the Billings office. There have been no questions asked us in regard to this bond, so there is no one who knows but what this bond has been on file in your office ever since it was signed." That is my signature signed to that.

Mr. BENNETT: That is all, Mr. Healow.

Mr. WIGGENHORN: That is all. Now, may the record show that by agreement of counsel certain correspondence in the office of the Commissioner of Agriculture of the State of Montana pertaining to this case may be offered by either of the parties without objection as to its competency? That applies particularly to copies of letters written by the Department of Agriculture, of which, of course, we don't have the originals and they would not therefore be competent evidence. And likewise, that they do not have to be identified? Do we understand each other?

Mr. BENNETT: I would like to correct or limit the competency in this regard; we are not objecting to it as not the best evidence. In other words, we are admitting the copies.

The COURT: Not as to the competency, but as to the [190] materiality, you will discuss that later?

Mr. WIGGENHORN: Yes, Your Honor. And likewise, that they don't have to be otherwise identified.

(Testimony of R. J. Healow.)

Mr. BENNETT: Yes.

Mr. WIGGENHORN: I will offer separately, then, Plaintiff's Exhibits 6-7-8-9-10-11-12-13-14-15-16 and 17, all being portions of the correspondence referred to.

Mr. BENNETT: No objection to Plaintiff's Exhibit 6.

EXHIBIT 6.

THE DYER-JENISON-BARRY CO.
LANSING INSURANCE AGENCY
INSURANCE

The Insurance Bldg.
123 South Grand Ave.,
Lansing, Michigan.

Apr. 29th, 1931

Division of Grain Standards,
Department of Agriculture,
Labor and Industry,
Butte, Montana.

Re: Chatterton & Son—
Bond No. 3591931

Gentlemen:

Here is a letter from the Bonding Company authorizing coverage under this bond to apply to Chatterton & Son, Inc., of Kansas City as of December 6th, 1930, which was the date of their incorpo-

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(Testimony of R. J. Healow.)

ration. We would appreciate it if you would let us know if this is satisfactory evidence.

Very truly yours,

THE DYER-JENISON-BARRY CO.

(signed) AUSTIN JENISON

Austin Jenison, Mgr.

Casualty & Surety Dept.

AJ/MS

No objection to Plaintiff's Exhibit 7.

EXHIBIT 7.

COPY

May 6, 1931

Austin Jenison, Manager,
Casualty & Surety Department,
Lansing, Michigan.

Dear Sir:

We are in receipt of your letter dated April 29 regarding a bond which Chatterton and Son gave to the State of Montana in the amount of \$10,000. This bond has not been filed with this department, and [191] we would appreciate it if you would look into the matter and have bond filed with us.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

(Testimony of R. J. Healow.)

No objection to Plaintiff's Exhibit 8, except Defendant objects to the second sheet of Plaintiff's Exhibit 8 on the grounds and for the reason that it is incompetent, irrelevant and immaterial, in that it purports to state facts from memory, which is not the best evidence, and that it is written at a time not coincident with the matters happening as stated in the letter.

The COURT: If it is from memory concerning some written document——

Mr. BENNETT: It is an attempt to state from memory dates and what happened, which I believe we are already offering in evidence here.

The COURT: Well, it may be received subject to your objection. If you have the correct dates and those are only from memory, I suppose the correct dates will prevail.

Mr. WIGGENHORN: May I just suggest, so there will be no inconsistency, I noticed your objection said "incompetent" as well as "irrelevant and immaterial."

Mr. BENNETT: I am not objecting to this on the ground it is not properly identified.

(Testimony of R. J. Healow.)

EXHIBIT 8.

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

May 12, 1931.

R. J. Healow,
Mont. & Wyo. Mgr.,
Department of Agriculture,
Helena, Montana.

Dear Mrs. Morris:

You will find inclosed public warehouseman's bond #3591931. This [192] bond was executed on the 7th day of January 1930, and the same has been in our files ever since. This was an oversight on our part, which we are very sorry occurred.

We have attached to this bond a letter dated May 4th, 1931, which will give you some information which you will want. You will note by the copy of this letter that Chatterton & Son, Incorporated of Kansas City, Missouri, dates back to December 6th, 1930. At that time Mr. Chatterton advised the bonding Company to change the name and also to have this bond extended to expire on July 1, 1931.

You will also note where they mailed the Continuation Certificate to the Department of Agriculture at Butte, Montana. It would seem to me that the Postmaster at Butte would forward this

(Testimony of R. J. Healow.)

letter to your office, or return the same to the bonding office.

We will keep after this until we get the right documents located at the right places.

This copy of a letter we are inclosing will show you that it was our intention to be bonded with the Department and to keep the bond in force under the new corporation, also that this bond is in force at this time. [193]

We will endeavor to locate the Continuation Certificate and have the same forwarded to you.

Yours very truly,

CHATTERTON & SON, INC.

RJH:BH

(signed) R. J. HEALOW

COPY

May 4th, 1931

Mr. R. J. Healow,
Chatterton & Son, Inc.
Billings, Montana

My dear Mr. Healow:

I will try to straighten out the situation in connection with the Warehouseman's Bond. This matter was originally brought to our attention some time during October 1929. Mr. Madsen asked me to get in touch with you, and on November 12th, 1929 we wrote to you saying that before we could go ahead with the issuance of this bond it was necessary to have sent on to us certain forms, statutory

(Testimony of R. J. Healow.)

in nature, required by the State of Montana. The reason for this was that each different state in the union words their various forms of bonds differently. We also wrote on December 6th, repeating our previous request, because we had not heard from you in the meantime. Apparently you then suggested that we write direct to the Secretary of Agriculture in Helena for these forms, which we did on December 16th. A few days later the forms were sent to us. The bond was executed and dated as of January 7th, 1930, and was mailed out of our office to you on January 15th, 1930—copy of letter in our file, saying that you should file this bond with the Secretary of the State of Montana, and going on to say that the bond had been properly executed both by the Lansing Office of Chatterton & Son and the Bonding Company, with seals attached.

This original bond ran from January 1st, 1930 to July 1st, 1930, or to make its expiration date coincide with the period required by the Department of Agriculture of Montana. This bond was signed by the Fidelity and Deposit Company of Baltimore, and the number is 3591931—the amount is \$10,000.00—and the annual premium is \$100.00. On or about the first of July to meet the requirements of the fiscal year of Montana a so-called Continuation Certificate was issued by the Bonding Company, and forwarded by our office to the Secretary of Agriculture at Billings, continuing the

(Testimony of R. J. Healow.)

bond in force for a year from July 1st, 1930 to July 1st, 1931.

About a month or so ago the Receiver and Attorney for the Lansing concern asked to have the bond cancelled as far as they were concerned. At the same time Mr. Chatterton said that he wished the bond in force for the Kansas City Corporation, so we had a letter written by the Bonding Company, dated December 6th, 1930, which was the date of the corporation at Kansas City, and addressed to the Division of Grain Standards and Marketing, Department of Agriculture, Labor and Industry, Butte, Montana, authorizing change of name of the principal of the bond. We do not know why this letter was addressed to Butte, Montana unless it was on information which the Bonding Company had from some Department of the State of Montana. This letter was forwarded on April 29th, and a copy of it was sent to the Kansas City Office on that same day. [194]

There is no question but what this bond has been in force since January 7th, 1930, and it must have been properly filed somewhere in the State of Montana or you could not have had your license to operate this warehouse. We are sending an extra carbon of this letter to you in case you wish to pass it on to anyone in authority in the state, and also a copy to your Kansas City Office, and we hope

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(Testimony of R. J. Healow.)

that this explanation will straighten everything out.

Very truly yours,

THE DYER-JENISON-
BARRY CO.

Austin Jenison, Mgr.

Casualty & Surety Dept.

AJ/MS

Mr. BENNETT: No objection to Exhibit 9.

EXHIBIT 9.

THE DYER-JENISON-BARRY CO.
LANSING INSURANCE AGENCY
INSURANCE

The Insurance Bldg., 123 South Grand Ave.
LANSING, MICHIGAN

May 12th, 1931

Department of Agriculture,
Labor and Industry,
Helena, Montana.

Attention: Mr. Morris—Division of Grain Stand-
ards and Marketing.

Dear Sir:

Your letter of May 6th in connection with the bond of Chatterton & Son, Inc. for operating a warehouse at Billings is before me, and I do not understand what has happened. This bond was written January 7th, 1930 by the Fidelity and

(Testimony of R. J. Healow.)

Deposit Company of Maryland and mailed out of our office on January 15th, 1930 to Mr. R. J. Healow, representative of Chatterton & Son at Billings, Montana, with instructions to file same with the Secretary of State. It was renewed on July 1st, 1930 to make its expiration date coincide with the period required by your Department, and continuation certificate was forwarded by our office to the Secretary of Agriculture at Helena. It is our understanding that Chatterton & Son had to be licensed in order to operate this warehouse, which they have been doing since the first part of 1930, so someone must have received the bond in order to have issued them the license.

In any event, the bond has gone astray, and we are asking our Company to issue a duplicate, which we will forward to you as soon as possible.

Very truly yours,

THE DYER-JENISON-
BARRY CO.

(signed) AUSTIN JENISON
Austin Jenison, Mgr.
Casualty & Surety Dept.

AJ/MS

[195]

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(Testimony of R. J. Healow.)

Mr. BENNETT: No objection to Exhibit 10.

EXHIBIT 10.

COPY

May 14, 1931

R. J. Healo, Manager,
Chatterton and Son, Inc.,
Billings, Montana.

Dear Mr. Healo:

I have your letter of May 12 in which you have inclosed a warehouse bond in the amount of \$10,000 covering your operations from January 1, 1930 to July 1, 1930. I certainly regret that this bond was overlooked and not filed with us at the time of its execution, as it would have avoided a great deal of misunderstanding in that territory regarding your operations. I would recommend that you locate the continuation certificate of this bond covering the period July 1, 1930 to July 1, 1931 and file it with us. Then in filing bond from July 1, 1931 to July 1, 1932 have a new bond executed and send us a license fee of \$15.00 to cover you the coming year.

This will straighten out the entire matter, making you a legally bonded warehouseman for the past 2 years, and if inquiries are again received here, we can satisfy the parties interested.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

(Testimony of R. J. Healow.)

Mr. BENNETT: No objection to Exhibit 11.

EXHIBIT 11.

COPY

May 15, 1931

Austin Jenison, Manager,
Casualty and Surety Department,
The Dyer-Jenison-Barry Company,
Lansing Insurance Agency,
Lansing, Michigan.

Dear Mr. Jenison:

Replying to your letter of May 12 regarding bond which you issued covering Chatterton and Son, Inc., their agent at Billings, Mr. Healo, found the original bond in his files and forwarded it to this office. However, the renewal certificate covering the period July 1, 1930 to July 1, 1931 has not been received by this office, and we kindly ask that you make out a duplicate of this certificate and send it to us. At no time did we issue a license to Chatterton and Son, as their bonds were mislaid and not filed with us.

The season for new bonds is on at this time and we are asking the company to furnish us a bond for the year July 1, 1931 to July 1, 1932, and we are asking that same be executed on form inclosed.

(Testimony of R. J. Healow.)

You may be taking care of this matter, and we are therefore sending this form to you.

Very truly yours,

Chief—Division of Grain

TM:C

Standards and Marketing

[196]

Mr. BENNETT: I object to Plaintiff's offered Exhibit 12 on the grounds that it is irrelevant and immaterial, and that page two of the exhibit purports to be a copy of an instrument, the original of which is before the Court at the present time, and is not a true and correct copy.

The COURT: What does it refer to?

Mr. BENNETT: This is a letter that purports to send to the Department of Agriculture a copy of the renewal certificate, and as I understand, you are offering the renewal certificate?

Mr. WIGGENHORN: Yes, of course; but the exhibit would not be complete without it. That is what identifies it. That is true, but the exhibit would not be complete without it.

The COURT: Very well, it will be received subject to your objection.

Mr. BENNETT: Note an exception. [197]

(Testimony of R. J. Healow.)

EXHIBIT 12.

THE DYER-JENISON-BARRY CO.
LANSING INSURANCE AGENCY
INSURANCE

The Insurance Bldg. 123 S. Grand Ave.
Lansing, Michigan

May 18th, 1931

Department of Agriculture,
Labor and Industry,
Helena, Montana

Attention: Mr. Morris—Chief—Division Of Grain
Standards and Marketing.

Dear Sir:

Your letter of the 15th in connection with Chatterton & Son, Inc. explains everything in relation to the Warehouseman's Bond. We are enclosing copy of Fidelity and Deposit Company's Renewal Certificate, showing that this bond was renewed for a period of one year commencing July 1st, 1930. We have forwarded the new form which you sent on to us, to the Bonding Company for execution, and will have it filed well before July 1st of this year.

Very truly yours,

THE DYER-JENISON-
BARRY CO.

(signed) AUSTIN JENISON

Austin Jenison, Mgr.

Casualty & Surety Dept.

AJ/MS

(Testimony of R. J. Healow.)

(Enclosure)

FIDELITY & DEPOSIT COMPANY

Premium \$100.00

BOND #5809

Assured—Chatterton & Son, Lansing, Michigan as Principal and the FIDELITY & DEPOSIT COMPANY OF MARYLAND, as Surety, in a certain Bond No. 3591931, dated the 7th day of January, 1930 in the Penalty of Ten Thousand Dollars (\$10,000.00) in favor of STATE OF MONTANA, do hereby continue said bond in force for the further term of one year beginning on the 1st day of July, 1930.

Provided, however, that said bond as continued hereby, shall be subject to all its terms and conditions, except as herein modified, and that the liability of the said FIDELITY & DEPOSIT COMPANY of Maryland under said bond and any and all continuations thereof shall in no event exceed in the aggregate the above named penalty, and that this certificate shall not be valid unless signed by said Principal.

Signed, sealed and dated this Tenth day of July, 1930. [198]

Mr. BENNETT: And we object to Plaintiff's Exhibit No. 13, on the grounds that it is irrelevant and immaterial, and that it refers to Plaintiff's Exhibit 12; and that it refers to an instrument,

(Testimony of R. J. Healow.)

the original of which is already offered in evidence, and is repetition.

The COURT: That will be received in the same manner, and the same ruling on it.

Mr. BENNETT: Note an exception.

EXHIBIT 13.

COPY

May 22, 1931.

Austin Jenison, Manager,
Casualty and Surety Department,
The Dyer-Jenison-Barry Company,
Lansing Insurance Agency,
Lansing, Michigan.

Dear Mr. Jenison:

This will acknowledge receipt of your letter of May 18 in which you have inclosed continuation certificate of warehouseman bond furnished the State of Montana and covering Chatterton and Son. We thank you very much for sending this to us. We note that you have forwarded the new form which we sent you to the bonding company for execution and it will be filed with this department before July 1 of this year.

We are pleased to have this information.

Very truly yours,

Chief—Division of Grain

Standards and Marketing

TM:C

(Testimony of R. J. Healow.)

Mr. BENNETT: No objection to Plaintiff's Exhibit 14.

EXHIBIT 14.

COPY

May 22, 1931.

R. J. Healo, Manager,
Chatterton and Son, Inc.,
Billings, Montana.

Dear Mr. Healo:

In this afternoon's mail I received a letter from the bonding department of the Fidelity and Casualty Company, Lansing, Michigan, in which they inclosed a continuation certificate of bond covering your operations for the period July 1, 1930 to July 1, 1931, and they have also notified us that new bond for the coming year will be executed [199] by the company and filed with us before July 1.

I am sure that this information is as pleasing to you as it is to me.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

Mr. BENNETT: We object to *Defendant's* Exhibit 15, as it is irrelevant and immaterial and re-

(Testimony of R. J. Healow.)

fers to the copy of an instrument already offered in evidence; and that it is repetition.

The COURT: The same ruling.

Mr. BENNETT: Note an exception.

EXHIBIT 15.

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

R. J. Healow, May 29, 1931
Mont. & Wyo. Mgr.

Dept. of Agriculture,
Helena, Montana.

Dear Mrs. Morris:

Pleased to receive your letter of May 22nd, informing us that the continuation certificate had reached your office.

While this is somewhat late, nevertheless you now understand that our intentions were good and we will endeavor to be more prompt in handling these matters in the future.

Yours very truly,

CHATTERTON & SON, INC.,
(signed) R. J. HEALOW

RJH:BH

Mr. BENNETT: No objection to Plaintiff's Exhibit 16.

(Testimony of R. J. Healow.)

EXHIBIT 16.

Billings, Montana

July 21, 1931

Department of Agriculture,
Helena, Montana.

Dear Mrs. Morris:

In looking over some of the effects of Chatterton & Son, I ran across bond No. 5809 which appears to be a continuation certificate of the [200] 1930 bond. This is signed by the president of the company, also acknowledged and I am sure the same is in effect at that time for any business done by Chatterton & Son previous to July 1, 1931.

This should have been mailed to you a long time ago, but it was overlooked when it was received at the Billings office. There have been no questions asked us in regard to this bond, so there is no one who knows but what this bond has been on file in your office ever since it was signed.

The Department can depend on me to do anything in my power to help the growers so they will not stand a loss.

Yours very truly,

(Signed) R. J. HEALOW

RJH:BH

Robert J. Healow.

P. S. In writing me address to: 114 Ave. D.

(Testimony of R. J. Healow.)

Mr. BENNETT: No objection to Plaintiff's Exhibit 17.

EXHIBIT 17.

COPY

July 23, 1931

Mr. Robert J. Healow,
114 Avenue "D",
Billings, Montana.

Dear Mr. Healow:

I have your letter of July 21 and certificate #5809 continuing your bond in force for last season. I am glad that the original certificate has been located. I have on file a copy of this certificate sent to the department by the bonding company agency in Lansing, Michigan. I certainly appreciate the fact that you sent this certificate here and your cooperation.

The storage tickets are coming in, but we have no word from Chatterton and Son of Kansas City as yet to matter of settlement. The company being solvent I see no reason of the necessity of calling the bonds and will not move here until we have something definite from the Kansas City office.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

(Testimony of R. J. Healow.)

Mr. WIGGENHORN: We now offer in evidence Plaintiff's Exhibit One, which again is covered by understanding and stipulation that it need not be identified, as I understand it, Mr. Bennett? (Handing Exhibit 1 to Mr. Bennett).

Mr. BENNETT: It is the understanding that it need not [201] be further identified.

Mr. WIGGENHORN: Now, we understand, do we not Mr. Bennett, that that is the same instrument referred to in Plaintiff's Exhibit number 6, as being inclosed therein?

Mr. BENNETT: That is the same.

Mr. WIGGENHORN: Then, in connection with this offer, Your Honor, it is understood that Exhibit One, which is an instrument executed by the bonding company, consenting to changing the name from Chatterton and Son to Chatterton and Son, Inc., was transmitted in the letter from the agent of the bonding company, which is marked "Plaintiff's Exhibit 6."

The COURT: Yes. What is the objection to it?

Mr. BENNETT: The general objection that it is incompetent, irrelevant and immaterial, in that it is not shown that the original bond or the renewal certificate has been filed with the Department of Agriculture or approved, or that a license to do business in the State of Montana has been issued to Chatterton and Son.

The COURT: Very well, it may be received in the same manner, and you may have the exception.

(Testimony of R. J. Healow.)

Mr. BENNETT: Yes, exception.

EXHIBIT 1.

FIDELITY AND DEPOSIT COMPANY
of Maryland
Fidelity and Surety Bonds
Burglary and Plate Glass Insurance
Dime Bank Building
DETROIT

J. L. Straughn
Resident Vice President

Telephone
Cadillac 4323-4-5

December 6th, 1930

Division of Grain Standards and Marketing,
Department of Agriculture,
Labor and Industry,
Butte, Montana. [202]

Re: #3591931—Chatterton & Son—Lansing, Michigan

Gentlemen:

This company is now surety on a Public Warehouseman's bond for the above in the penalty of \$10,000.00 in favor of the State of Montana.

It is our understanding that Chatterton & Son have incorporated their Kansas City office under the name of "Chatterton & Son, Inc.". You may consider this letter as our consent as surety, to this

(Testimony of R. J. Healow.)

change and the coverage under this bond will not in any way be *effected* by it.

Very truly yours,

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND
BY: (Signed JOSEPH A. BACH

JAB:H Attorney in fact (Seal)
(CORPORATE SEAL)

(It was agreed between counsel that Plaintiff's Exhibits 1, 2 and 3 remained in the hands of the Department of Agriculture of the State of Montana from the time they received them, as shown by the testimony, until they were offered here.) [203]

Plaintiff's "Exhibit 5" received in evidence without objection.

EXHIBIT 5.

STATE OF MICHIGAN
THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM
IN CHANCERY

In the Matter of the Petition of H. E. Chatterton,
et al, for the dissolution of Chatterton & Son,
a Michigan Corporation.

The petition of H. E. Chatterton, B. A. Stickle,
L. E. Marshall, H. H. Calkins, A. E. Schepers,

(Testimony of R. J. Healow.)

T. J. Hubbard and M. B. Keeler, representing the entire Board of Directors of Chatterton & Son, a Michigan corporation having its office and principal place for the transaction of business in the city of Lansing, in said county, for the dissolution of said corporation, Chatterton & Son, having come on to be heard on an order to show cause issued in the premises under the statute in such case made and provided, and from proofs taken in open Court it appearing to the Court that said Corporation, while not insolvent, has been forced to suspend operation by reason of the fact that so much of its assets are invested in property of a fixed and permanent nature as to make it impossible to properly finance operations; and it further appearing that by reason of such fixed investments and the demands of creditors to whom large sums of money are owing and from whom legal proceedings have been threatened would prevent the orderly liquidation of such assets by the company itself without the aid of this Court; and it appearing to the Court that a dissolution of said Corporation will be beneficial to the stockholders and creditors of the corporation and not injurious to public interests,

NOW, THEREFORE, it is ordered, adjudged and decreed, and this Court, by virtue of the power therein vested by statute does order, adjudge and decree, that Chatterton & Son, a Michigan corporation be and the same is hereby dissolved.

It is further ordered and adjudged that Joseph Gerson, of Lansing, Michigan, be and he is hereby

(Testimony of R. J. Healow.)

appointed permanent receiver of the property, estate and effects of said Corporation for the purpose of liquidating such assets and distributing the proceeds to those entitled thereto under further orders and further instructions of this Court.

It is further ordered that the receiver on or before the 25th day of April, 1931, file with the clerk of said Court a bond subject to approval of this Court in the penal sum of Fifty Thousand Dollars, condition for the faithful performance of the duties of the receiver in proper execution of his trust under such orders as the Court from time to time shall give.

Leland W. Carr
Circuit Judge.

Dated: Lansing, Michigan April 22nd, 1931.

[204]

STATE OF MICHIGAN : ss.

County of Ingham :

I, C. ROSS HILLIARD, Clerk of the Circuit Court for the County of Ingham, do hereby certify that the above and foregoing is a true and correct copy of Order of Dissolution entered April 22, 1931, in the above entitled cause in said Court, as appears of record in my office, and that I have compared the same with the original, and that it is a true transcript therefrom and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at

(Testimony of R. J. Healow.)

Lansing, Michigan, this 16th day of May, A. D.
1935.

C. ROSS HILLIARD,

County Clerk

(SEAL) By (signed) IRENE M. FERRIS
Deputy County Clerk

Witness excused.

G. B. DEAVITT,

a witness called for the plaintiff, being first duly
sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

My name is G. B. Deavitt. I am sixty-six. I live in the vicinity of Billings. I was one of the bean growers who deposited some of my beans for storage with Chatterton and Son in the season of 1930. The manager of the warehouse, at the time I placed my beans in storage, told me it was a bonded warehouse.

Q. And did that in any way enter into your determination and conclusion to put the beans in that warehouse?

Mr. BENNETT: Just a moment? That is objected to as incompetent, irrelevant and immaterial, not binding on this defendant, and hearsay.

(Testimony of G. B. Deavitt.)

Mr. WIGGENHORN: That is our case, Your Honor; that is our position, of course, that there must be a consideration, suing as we are on a common law bond, that we acted on reliance—each individual owner, that we acted upon reliance on the bond which had been given. [205]

The COURT: I think so. Overrule the objection.

Mr. BENNETT: Note an exception.

A. It did.

His statement that the warehouse was bonded influenced my decision in putting the beans in that warehouse, as I thought they would be safe. This information also influenced me in keeping the beans there. I never saw the bond myself.

No cross-examination. Witness excused.

WILBUR SANDERSON,

called as a witness for the plaintiff, being first duly sworn, testified as follows:

(Mr. BENNETT: It is stipulated between counsel that this witness will testify in substance the same as the preceding witness; and to save time, that as to this line of testimony we wish to register a general objection that it is incompetent, irrelevant and immaterial, hearsay and not binding on this party defendant.)

The COURT: That may be understood; and it is overruled, and it is excepted to.)

Witness excused.

H. A. APPLEBY,

a witness called for the plaintiff, being first duly sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

My name is H. A. Appleby. I live in the vicinity of Billings. I am one of the bean growers that deposited my beans in the Chatterton warehouse for the 1930 crop.

Mr. WIGGENHORN: And will you again admit that this witness will testify to the same thing that Mr. Deavitt testified, subject to your objection of course? [206]

Mr. BENNETT: Yes.

The COURT: All right.

I was one of the committee of three selected by the owners of beans in this warehouse. They chose the three of us to represent them as a whole.

This was occasioned by my getting a call that they were shipping the beans out some time in July 1931, so a bunch of the bean growers got together and we had a meeting at the Commercial Club in Billings. It was quite a large meeting. The other men there were in a similar situation. They had all learned of the same thing. There were about thirty-five growers present. Mr. Moran, a deputy of the Department of Agriculture, was here. He had something to do with getting us together, and a committee was selected at that time. Mr. Harris and Mr. Kober were the other two members

(Testimony of H. A. Appleby.)

of the committee. We were selected by this group of men.

(It was stipulated by counsel for both parties that this committee was selected to act for the whole.)

No cross-examination. Witness excused.

LEWIN KOBER,

a witness called for the plaintiff, being first duly sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

My name is Lewin Kober, third member of this committee.

(It is agreed between counsel for both parties that Mr. Kober will repeat Mr. Deavitt's testimony, subject to the same objection. The Court made the same ruling.)

I have been growing beans prior to the time I was a member of this committee, and had had quite a lot of experience in growing [207] and handling beans. I recall when the warehouse was closed. I used to stop at the warehouse about once a week to see if my beans were still there. My lot of beans was there, but about July 16 or 17 when I went to the warehouse they were gone. They were loading at that time. The meeting that Mr.

(Testimony of Lewin Kober.)

Appleby has testified to was held a few days afterwards. I attended the meeting.

A grower ordinarily selects a big, firm bean for seed. If my beans in sacks in the warehouse were a number one bean, they would be fit for seed. I would not have to go over that sack and pick out certain ones for seed. I should think that any marketable number one bean would be proper for seed, and it is so understood among the growers who understand the business. We usually pick a number one bean for seed.

CROSS-EXAMINATION

By Mr. BENNETT.

I received back some of the beans that were stored. This spring I bought my bean seeds at the beanery. I think a number one bean is good enough for a seed bean. Number two and number three are not.

Witness excused.

Plaintiffs then presented and offered the deposition of H. E. Chatterton as a witness, duly sworn, taken pursuant to stipulation, objections being registered at time of taking deposition and ruled on at the trial. [208]

DIRECT EXAMINATION

By Mr. WIGGENHORN.

H. E. CHATTERTON,

a witness called for the plaintiff, whose testimony was procured by a deposition pursuant to stipulation, being first duly sworn, testified as follows:

My name is Howard E. Chatterton of Basin, Wyoming. I was born March 16, 1872. I am in the bean business. I usually go by the name of H. E. Chatterton.

I was president of Chatterton and Son, a corporation of Lansing, Michigan. My father and myself organized the company. We had been in business approximately twenty-five years before the year 1931, originally at Mount Pleasant, Michigan and later at Lansing, Michigan. In 1930 and immediately thereafter the main office of the company was at Lansing. I was then its president, and my father was deceased. Our business was operating a chain of elevators through the State of Michigan, and terminal warehouses. The principal business was the bean business. By that I mean the buying and selling and storage of beans. We had approximately thirty warehouses through the State of Michigan, and a terminal warehouse at Toledo, Ohio, one at Kansas City, Missouri, and one at Billings, Montana. The one at Billings was not a terminal warehouse. By a terminal warehouse we mean one where we buy beans and ship them in there for processing. At Billings the beans were

(Testimony of H. E. Chatterton.)

practically all from the growers, with the exception of a few that were bought down in Wyoming. Seventy-five per cent of our business all over was the bean business in 1930.

In 1930 I was the president and chairman of the Board of Directors of the company. At that time we started to put beans up [209] in cartons and I spent most of my time looking after the carton business. I was the active head of the company.

In 1919 I signed over \$100,000 worth of stock to three young men, to be paid for out of the profits. I was still the president and chairman of the board and drawing a salary, but I was not active with the business, only that I made it a point to go to Lansing about every ten days, or two weeks and attend the directors' meetings, and was in close touch with the office by phone. But by 1925 or 1926 I was again in active charge of the business and spent all my time with Chatterton and Son. Until the close of the company I was the active head.

The Kansas City terminal was engaged exclusively in the bean business. It was in no way engaged in the grain business.

The warehouse at Billings was established along in August 1928 or 1929. It was closed in 1931 and troubles ensued. That was some time in June or July. The 1930 crop was then in storage. We had also handled the 1929 crop and I am under the impression that we handled the 1928 crop in Billings.

(Testimony of H. E. Chatterton.)

The warehouse at Billings was engaged exclusively in the bean business. We were buying beans from the farmers, cleaning them, storing them and shipping them out on orders sent from either the Kansas City or Lansing office. We were also engaged in warehousing beans. A large percentage of the business at Billings was conducted through the Kansas City office. I think, however, that they received most of their instructions from the Lansing office.

We also had a warehouse at Twin Falls, Idaho, none in Colorado but buyers at Greybull, Wyoming and Powell, Wyoming. All this western business consisted exclusively of beans. Ninety-five per cent of them were Great Northerns, which are particularly a western product. [210]

Chatterton and Son frequently did business with surety companies. The Dyer-Jenison-Barry Company handled practically all of our bond business. Austin Jenison was the individual in that agency who handled this. Ninety-five per cent of our bond business was done through them. My relationship with Mr. Jenison was an intimate one. We received railroad bonds mostly from this agency. These are bonds furnished the railroad companies for the delivery of cars without the original bill of lading. When we first started to do business with them, we filed our financial statement with them, and from time to time, when it was necessary to solicit bonds, they wrote the bond on the face of the statement that we had filed with them, so that we did

(Testimony of H. E. Chatterton.)

not have to go through the usual form every time we applied for a bond.

Mr. Jenison became quite familiar with the character of our business. Mr. Jenison and I were also members of the Elks lodge together. We were members of the same country club, and Mr. Madsen and Mr. Stickle and Mr. Reynolds, our attorney, were members of the same bridge club. Mr. Madsen was secretary and treasurer of Chatterton and Son. Mr. Stickle was a director, and vice president and manager of the bean department. Mr. Reynolds was our attorney. We had another individual who was the manager of the grain department.

Mr. Jenison knew that Mr. Stickle was manager of the bean department. We were all members of a certain bridge club, composed of twelve gentlemen, and we met more or less frequently, and on those occasions we talked to each other about my business affairs, more or less. Mr. Jenison, during these various contacts I have mentioned, became acquainted with the general character of the business of Chatterton & Son, because when we first made application for our bonds, why he was informed then as to what the character of our business was. We had been doing business with them for several years. They also carried the insurance on our automobiles around the various plants.

As to what knowledge Mr. Jenison gained of the predominance of our bean business, we were at that time doing business with the three [211] large

(Testimony of H. E. Chatterton.)

advertised bean canners, and we were proud of it, and Mr. Jenison being a personal friend of all four of us, we used to tell him about some of the volume of bean business that we had put through. As business men, we were prone occasionally to boast of our business.

He gained knowledge that our western business including Billings was exclusively the bean business because we did not talk about handling anything else excepting beans. Particularly he knew that our western business was exclusively the bean business and he knew Mr. Stickle was manager of the bean department.

The railroad bonds referred to were written partly on our western business. I am under the impression that the bonds specified the commodity in which the shipments were to be made. That commodity would be beans.

On the bond which is the subject of this suit dated January 7, 1930, given by Fidelity and Deposit Company of Maryland as surety and Chatterton and Son as principal, was signed by V. A. Stickle as vice president, the same man I have heretofore referred to. I did not sign the bond for the company. Mr. Stickle signed the bond. I think because he was manager of the bean department and it would be natural for it to be referred to him.

The renewal certificate is signed by Fidelity and Deposit Company of Maryland, dated July 10, 1930, and was signed by myself. I do not remember doing

(Testimony of H. E. Chatterton.)

so, but it shows that I did. I might have done so because of Mr. Stickle's absence.

The paper marked for identification "Exhibit A", a photostatic copy of the application for this bond referred to, appears to have been signed by myself, although I do not remember it. I do recollect the occasion when this bond was sought and received because of correspondence that I had with Mr. Healow, manager of the Billings plant at the time the request for the bond was made by the Commissioner of Agriculture. I remember that the bond was requested and supplied, [212] but I do not remember this precise application. I do not recall signing the renewal certificate or of not signing the original bond, but I do remember the request by the Commissioner of Agriculture to furnish a bond, and the correspondence that I had with Mr. Healow.

(Exhibit A offered in evidence without objection.)

EXHIBIT A.

[PRINTER'S NOTE: Exhibit A—Photostatic copy of application for bond here set forth in the typewritten record is already set forth in the printed record at pages 95-98, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [213]

(For the purposes of the record, Mr. Bennett admits that the Dyer-Jenison-Barry Company of Lansing, Michigan, were the agents for the Fidelity and Deposit Company of Maryland, the defendants herein.)

(Testimony of H. E. Chatterton.)

The Kansas City branch was later incorporated as a separate corporation under the name of Chatterton and Son, Inc., some time in 1931. It might have been December 6, 1930. The incorporating of the Kansas City branch was an idea of my own, after I had made up my mind that there was no possible show of saving Chatterton and Son, and I thought that by getting permission from my creditors, if I would incorporate it I might keep it as a going concern. It did not change the status of the business of Chatterton and Son any time up to the time that the Joe Gerson Company was incorporated, which took over the assets of Chatterton and Son, Inc., and Chatterton and Son, Inc., then bought the assets from the Joe Gerson Company. The facts are, in order to get them straight, that the branch was first incorporated as Chatterton and Son, Inc., and was occasioned by reason [216] of certain pressing financial obligations of Chatterton and Son in Lansing, Michigan; that the stock of Chatterton and Son, Inc., was wholly owned by either Chatterton and Son or the receiver of that company, who was Joseph Gerson of Lansing, Michigan; that Chatterton and Son went into the hands of a receiver April 1931; that subsequently the name of Chatterton and Son, Inc., was changed to Joseph Gerson and Company, and thereafter a new company was organized known as Chatterton and Son, Inc., having no connection of any sort with either Chatterton and Son or the original Chatterton and Son, Inc.

(Testimony of H. E. Chatterton.)

When Chatterton and Son, Inc., was incorporated, it just took over the assets that it had there in Kansas City, but the assets of Chatterton and Son, Inc., belonged to the receiver of Chatterton and Son. Therefore, the assets here at Billings belonged to the receiver of Chatterton and Son. After the receiver was appointed, Chatterton and Son was no longer in active business and has not been since, although the affairs of the receiver are not yet finished.

In order to clear the record, because of having two different corporations known as Chatterton and Son, Inc., we will call them respectively Chatterton and Son, Inc., the first and Chatterton and Son, Inc., the second.

Chatterton and Son, Inc., the first changed its name to Joseph Gerson Company, which company took over all of its assets and finally it was dissolved in 1933. It was a Missouri corporation. Our warehouse was closed here in Billings about June of 1931, and there were not sufficient beans in the warehouse here to satisfy the outstanding warehouse receipts. Settlement was made through representatives of the bean growers at Kansas City by Chatterton and Son, Inc., the first, and that company, to the best of my knowledge, turned over all of its remaining assets at that time to the representatives of the bean growers and to Mr. Stafford, the Commissioner of Agriculture of the State of Montana.

(Testimony of H. E. Chatterton.)

These assets consisted mostly of promissory notes and beans and cash put up with the bonding company for a bond. I know there was \$2500.00 deposited with a bonding company, not the Fidelity and Deposit Company of Maryland. There was around \$8000 or \$9000 worth of beans released and the promissory notes totaled about the same amount. I don't know whether these bonds were paid or cashed in. After turning over these assets, there was no property left in Chatterton and Son, Inc., the first. That company has done no business since then.

CROSS-EXAMINATION

By Mr. BENNETT.

I am now living at Basin, Wyoming. I am in the bean business, doing business under the name of Chatterton and Company, and that is a separate corporation from any of those that we have been talking about. It is not a corporation; it is a partnership.

I was the president and chairman of the board of Chatterton and Son, the original company, and except for a period between 1919 and 1925, I was the active head. During that period I was also the president and chairman of the board, but during the period of 1919 to 1925, I turned over the actual handling of the business to three men. They were no relation of mine whatever.

I cannot tell you the approximate date when Chatterton and Son became financially involved. I

(Testimony of H. E. Chatterton.)

testified that Chatterton and Son was in bad shape and decided to cut off the Kansas City branch and incorporate it. That was approximately December 6, 1930. Chatterton and Son, Inc., was merely the incorporation of the Kansas City branch of the original Chatterton and Son. Thereafter, Chatterton and Son, Inc., turned over their assets to the Joseph Gerson Company. That was along in 1931. I was the president of Chatterton and Son, Inc., the first. I don't think we had a chairman of the board. [218] I continued as president as long as this company carried on business. I held no position whatever with the Joseph Gerson Company. The officers of the Joseph Gerson Company were composed of Mr. Reynolds, Mr. Gerson and Mr. Calkins, the auditor of the old company of Chatterton and Son. This is the same Mr. Reynolds that I referred to as our attorney in Lansing. He was also the attorney for the receiver.

The stock of Chatterton and Son, Inc., the first which was taken over by the receiver of Chatterton and Son, was not sold by the receiver. The Joseph Gerson Company, referred to herein, was Chatterton and Son, Inc., number one, and merely was a change of name. That was some time in 1931. At the time Chatterton and Son, Inc., changed its name, there were still some assets left. No receiver was appointed for the Joseph Gerson Company. The beans, cash and notes that were held by this company were turned over to the representatives of the growers from Montana.

(Testimony of H. E. Chatterton.)

Thereafter, we formed an entirely new corporation called Chatterton and Son, Inc., which we have referred to as number two. That was just a little while before the representatives of the growers in Montana came down there. This second corporation acquired none of the assets of either Chatterton and Son or Chatterton and Son, Inc., the first. It was a new company with new financing. I was the president of Chatterton and Son, Inc., the second which was later taken over by Sinshimer and Company of San Francisco, California, who were stockholders in Chatterton and Son, Inc., the second.

All these various companies were in the same line of business. Chatterton and Son's principal office was at Lansing, Michigan. It was an elevator and warehouse business. A large portion of it was in handling beans. Some portion of the business was in grain. We had a grain department in Lansing, Michigan, and also a bean department. There was a manager at the head of each [219] separate department. At our country elevators, we also handled seeds, building material and supplies and coal. Our business generally was that of bean and grain jobbers. The grain business was a small portion of our business. We were referred to as the largest bean jobbers in the United States. We retailed coal and other materials. Seventy-five per cent of our business was beans.

(Testimony of H. E. Chatterton.)

When we first started in business, my father and I, we would take in fifteen car loads of grain to one car of beans. Later on we would take in fifteen car loads of beans to one car of grain. We only had one elevator at first. We did not do any jobbing business. We conducted what we termed a general elevator business. We gradually took on more elevators and worked into the jobbing end of it. From 1928 to 1931 we had thirty elevators or more. Nearly all of them were in Michigan. We did not handle any grain from growers in any states except Michigan. We did some jobbing business in other states, such as buying corn and oats in Illinois or Indiana, and selling it to the elevator people in Michigan. We bought beans in California, Idaho, New Mexico, Colorado, Nebraska, Wyoming, Montana, Kansas, New York, Maine, Wisconsin and Michigan. Our Lansing grain department bought grain in Illinois and Indiana. We had a terminal plant in Ohio. We bought a few beans in Ohio and tried to get the farmers there to develop and market and grow beans. We had a plant in Toledo which we used for processing beans, I mean hand picking them and preparing them for commercial grades.

We did not job coal. We handled coal, that is, we had a man in Lansing that looked after all our elevators in Michigan, and when one of them wanted a car load of coal, he would buy it and send it to this particular elevator.

(Testimony of H. E. Chatterton.)

We had thirty or more elevators in Michigan. They would handle beans that were bought in their immediate vicinity. [220]

Occasionally we would handle other commodities through Michigan. From 1928 to 1930 we had an extensive business. We had agents located at various sections working for us, but not in all of those states. For instance, Colorado was handled from the Kansas City office. Mr. Robert Healow was our agent here at Billings to handle this immediate territory.

The railroad companies required bonds, but not the states. Whenever the states did require bonds, we took them on. We depended upon our agents in the particular territories to advise us when and under what circumstances they needed a bond.

The bond here in question was handled through Mr. Healow here at Billings, and he notified me in reference to that. I do not remember having signed this particular application or bond. There was quite a number of them submitted to me for signature. I depended upon my subordinates to see that the forms were correct. I might modify that; of course these things were discussed when we opened up a new warehouse. And of course it was understood that where we operated warehouses that we had to have bonds, where the state required it, and also where we had cars coming in billed to our order, where they wanted the railroad companies to make the deliveries of the car without the orig-

(Testimony of H. E. Chatterton.)

inal bill of lading, which would save demurrage and delays. There is lots of times the cars would get in before the papers would come to the banks.

As to the number of employees we had from 1929 through 1931, it is pretty hard to say. For instance, at Toledo at different times of the year, there are a good many ladies hand picking, and then we would have two or three in the office and two or three in the plant. It would all depend on how busy we were. In a country elevator we figured on having two or three employees, but in the fall we had more. Our employees, outside of seasonal employees, I would say varied from twenty-five to fifty.

In the year 1929 our total sales were better than twenty [221] million dollars. Our assets in the way of elevators and warehouses were more than a million. I had quite a business in those days to have it get away from me over night.

On Plaintiff's Exhibit A, that is my signature, H. E. Chatterton. This "Chatterton and Son" was signed by Mr. Madsen, the secretary of the company. I remember receiving a letter from Mr. Healow stating that the Commissioner of Agriculture of the State of Montana demanded a bond and it was in reference to supplying this bond that I signed this application. This bond was issued.

We bought beans from the growers and other dealers and then sold them. Sometimes we sold them before we bought them. We also acted as

(Testimony of H. E. Chatterton.)

warehouseman for the growers here at Billings, at Toledo, Ohio and at our elevators in Michigan. At these places we did a warehouse business as distinct from the actual buying. I do not know what proportion of the beans during the years 1929, 1930 and 1931 were purchased outright and what proportion were placed in the warehouse under receipts here at Billings.

In reference to the beans being shipped from Billings, we would make a request on Mr. Healow for certain carloads of beans covering certain grades, and if he had them he would ship them.

Most of our warehouse receipts were issued in such a way that we did not agree to keep the identity of each different lot of beans intact. I know that after the failure, some shortage was found here at Billings, but I think that we had as many beans here as we had issued storage tickets for. I think that in June or July 1931 we had sufficient beans in this storage house to cover the storage receipts. That is, we meant to keep as many beans here as we had storage tickets for. That was our intention anyhow, and if they were not there, Mr. Healow had done that.

I do not know what proportion of the beans shipped during 1931, up to August in 1931, were purchased outright and what beans belonged to the growers, but I know that I hired Ernst and Ernst to come up here and check it up and it was hard to tell from the records [222] here just what

(Testimony of H. E. Chatterton.)

the status was. They reported that Mr. Healow did not keep his books just right. I do not know that of my own knowledge.

We did whatever bond business we had with the firm of Dyer-Jenison-Barry Company of Lansing, Michigan. We were rather intimate friends. I do mean to say Mr. Jenison could have particular familiarity with a firm of our size and caliber because we had known him for quite a good many years—ever since 1919—and we had been doing business with them twelve or fourteen years. He knew we had a grain department in Lansing. He knew that at times we engaged in handling coal and other materials. I would not say that he knew we engaged in handling grain and beans as well as other commodities over the United States because we did not deal in grain over the United States; just in Michigan, and we bought some oats and corn from Illinois to sell to the dealers in Michigan. I would not want to say that he knew that we bought grain and corn to sell to Michigan because the main part of our business was the bean business, over 75% of it,—probably even more than that. For instance, I have taken an order from the Campbell Soup Company for three quarters of a million dollars at one time. If Mr. Jenison made the statement that he understood we were engaged in the general bean and grain business I would say that would be correct.

(Testimony of H. E. Chatterton.)

It was the duty of the officers and agents of the company to determine what particular kind of bonds were to be issued in any particular line of business, and they in turn made application to the firm of Dyer-Jenison-Barry Company for the bond. This firm acted merely to procure the bond that our agents or officers asked for. We would make application to them and it was their business to get that particular kind of a bond. Mr. Jenison never had any position with our company. We gave this agency quite a bit of business. Personally, I do not know of a bond that we ever wrote outside of that company. It would not run into a big lot of money. There were some personal bonds, also. They also wrote the bonds that the railroads required. [223]

This firm carried on a sort of insurance business. They wrote some of our automobile insurance and on some of our plants. Our agent here, Mr. Healow, did not have a power of attorney for the company. He did not have any authority to sign the company's name except in issuing a warehouse receipt or something like that which were in a printed form with the name of Chatterton and Son, and he would put "per Mr. Healow."

We kept him posted as to what prices he should pay and he bought whatever was offered to him. He went out in the field and bought it up and then notified the company what he had purchased. He would draw a draft on the company to pay for it,

(Testimony of H. E. Chatterton.)

or he might send in the money and deposit it in the bank. He acted as our agent. Everything in this particular district was in his hands. Mr. Jenison was not so familiar with our business that he knew in every state of the Union what our business was limited to.

REDIRECT EXAMINATION

By Mr. WIGGENHORN.

We handled no grain whatever in Montana and none in this Billings warehouse. In the trade and colloquially a warehouse handling grain alone is called an elevator.

Q. And is that word "elevator" ever used in connection with the storage of beans?

Mr. BENNETT: I just want to register an objection there, that it is calling for a conclusion of the witness and he has not shown himself qualified to testify whether those terms are ever used.

The COURT: I will overrule your objection.

Mr. BENNETT: Exception.

A. No, not to my knowledge.

Q. And what is the expression used as known in the trade and colloquially used to describe or designate the place where beans are stored?

A. Warehouse.

Q. Is the word "warehouse" ever used in the trade or colloquially to designate a grain elevator or its equivalent? [224]

A. Not to my knowledge. I might say this, that the nature of the western beans is such that they

(Testimony of H. E. Chatterton.)

could not be handled in an elevator. They have to be handled in warehouses.

A place where beans are stored is known as a warehouse. To my knowledge, that word is never used to designate a grain elevator or its equivalent.

Western beans are of such character that they have to be handled in warehouses, due to the fact that the western bean has a very thin fibre on the outside and if they are handled in an elevator the slippage is terrific, and they have to be handled in bags and handled in such a way that they won't have that shrinkage; while the Michigan beans have a very tough wood fibre and they are handled in an elevator more like grain and none of the western varieties are handled that way. They are handled in sacks or bags.

We started out in what is known as a general elevator business, which was composed mostly of grain, and as years went on the farmers started raising more beans so that our business was mostly bean business instead of grain business. Our progress into the bean business was simply the progress of the business, no differently with us than with other dealers.

By 1930 the bean business was quite some business, not only with me, but generally. In the western states the bean business was of more recent growth. It has just been in the last few years, principally because of the development of the Great Northern bean, which has acquired a great

(Testimony of H. E. Chatterton.)

demand in the trade. This is an entirely different bean from the Michigan bean. We were known in the trade as the largest jobbers of beans, this was generally known and Mr. Jenison knew it.

This agency here at Billings was not Mr. Healow's business. The business belonged to Chatterton and Son. Mr. Healow was merely employed on a salary.

Q. Now I wonder, Mr. Chatterton, whether you have not gotten mixed up here somewhat with reference to the occasion for furnishing this [225] bond in the first place; and so as to refresh your memory and frankly suggesting to you that you may be confused with the year later when a bond was required by the Commissioner of Agriculture, I hand you a letter written by you for Chatterton & Son, Incorporated, from Kansas City, to Mr. Healow, dated April 18, 1931. If you will just read that and see if that refreshes your memory any?

A. Well, I had——

Q. Just before you answer it, I want to add something. Now I call your attention in particular that this bond was given in January 1930, a year and four months or thereabouts prior to the time referred to in that letter. Now then, getting back again to the occasion for giving the bond in January, 1930, is there anything you wish to correct, or were you right in the first place? I am not

(Testimony of H. E. Chatterton.)

suggesting it, I am merely inquiring, Mr. Chatterton.

A. Well, I don't think I just understand your question.

Q. Well, maybe I will have to lead you a bit. Is it not true, that as disclosed by that letter, that in April or thereabouts, 1931, the Commissioner of Agriculture of Montana was requesting of your agent, Mr. Healow, at Billings, a bond for this warehouse at Billings?

A. Yes, sir.

Q. And at that time it appears that in some manner or other it had been overlooked, that a bond had already been furnished?

A. Yes, sir; that is what this letter states.

Mr. BENNETT: Just a moment? I wish to strike the latter part of the answer of the witness on the grounds as to what the letter states. The letter is not in evidence, unless you wish to offer it.

Mr. WIGGENHORN: Yes, I will be glad to offer it. Just mark it for identification?

(Letter referred to marked "Exhibit B" for identification.)

Q. I hand you Exhibit B and will ask you to identify this document? [226]

A. Yes, sir.

Q. Just describe it, what is it?

A. It is a letter that I wrote to Mr. Healow replying to a letter that he had wrote to me in reference to a bond.

(Testimony of H. E. Chatterton.)

Q. And it bears your signature?

A. Yes, sir.

Q. And are the facts that appear therein true?

A. Yes, sir.

Mr. WIGGENHORN: In view of counsel's objection, I now offer the letter in evidence.

Mr. BENNETT: I want to offer a formal objection here. We object to the admission of Exhibit B on the grounds that it is a self-serving declaration and that it purports to state facts that have not been in evidence or testified to, and that it is not competent, relevant or material to the issues in this case, and that a part of this, the letter to which this purports to be a response, has not been offered in evidence or identified.

Mr. WIGGENHORN: May I say by way of argument, Your Honor, in reply to the objection that, as appears from the deposition, the previous question asked was, "And at that time it appears that in some manner or other it had been overlooked." And then Mr. Bennett objects to his testifying to that because the letter was not the best evidence, and then I offered the letter. And his objection now is that the letter is self-serving and incompetent, irrelevant and immaterial.

The COURT: Well, it seems to me that it may be material. You may want to raise a point on that.

Mr. WIGGENHORN: Shall I read the letter?
[227]

(Testimony of H. E. Chatterton.)

The COURT: Yes.

(Exhibit B read by Mr. Wiggenhorn.)

Mr. WIGGENHORN: By the way, it is offered, Your Honor, merely to clear up the previous testimony, wherein he testified to the same facts occurring a year and four months earlier.

The COURT: Well, I think it would be material for that too. I will overrule the objection.

Mr. BENNETT: Note an exception.

EXHIBIT B

CHATTERTON & SON

Kansas City, Mo.

April 18, 1931.

Mr. R. J. Healow,
Chatterton & Son,
Billings, Mont.

Dear Mr. Healow:

We acknowledge receipt of yours of April 13th, relative to application for ten thousand dollar bond to be filed with the State of Montana, in order to obtain warehouseman's license.

Chatterton & Son filed this bond last year, and after Chatterton & Son, Inc. was organized, the bonding company wrote us relative to having this bond transferred from Chatterton & Son to Chatterton & Son, Inc., and we advised them that this

(Testimony of H. E. Chatterton.)

would be satisfactory. Under date of April 8th I received a letter from the bonding company's agents, The Dyer-Jenison-Barry Company of Lansing, which I am enclosing herewith. You will notice that the fourth paragraph of this letter speaks about this bond, and they will receive a letter in a day or two with the company's permission to make this change. In doing this it will save the premium on a new bond and should answer the requirements of the Secretary of the State of Montana.

If for any reason this does not cover your requirements, kindly take the matter up with us, but we feel confident that it will, and are therefore returning you herewith the application for a new bond with the Aetna Casualty and Surety Company.

Yours very truly,

CHATTERTON & SON, INC.

Per H. E. Chatterton.

HEC:Q

I remember the occasion when this letter was written and it brings things to my mind. Using this letter to refresh my memory, it seems to me that the application was made for this bond, and after the bond was issued it was sent to Mr. Healow. By that I mean that the original bond, as I remember it, was made out and sent to Mr. [228] Healow. That was about a year before that. That would be

(Testimony of H. E. Chatterton.)

in 1930. Later on, Mr. Healow wrote us for a bond and I wrote back and told him that this bond had been issued and that he must have received it, and I also took up the matter with Mr. Jenison. I think this bond was later found in Mr. Healow's files. In April 1931, when this letter was written, a bond was demanded of our company. I then discovered that a bond had already been written and that is the bond that we are now talking about in this suit.

Q. Now then, getting back again to what you testified before, wherein you said that the occasion of writing the bond in the first instance, which was in January, 1930, more than a year prior to when you wrote this letter, was a demand in January, 1930, from the Commissioner of Agriculture for a bond. Do you wish to correct that, or is that still correct?

A. Well, no.

Q. Or do you know?

A. I do not know, but I have just a faint recollection of when this matter of a bond came up—

Mr. BENNETT: Just a moment, Mr. Chatterton; I want to object. The witness has testified that he did not know and I am going to object to any faint recollections as being an improper answer to the question which he already answered, and object to it as incompetent, irrelevant and immaterial.

The COURT: Well, I would have to sustain the objection to the faint recollection.

(Testimony of H. E. Chatterton.)

Q. Well, we will let the Judge and jury determine what the definiteness of your recollection is. You may tell us just what is in your mind, Mr. Chatterton?

Mr. WIGGENHORN: Is the objection sustained?

The COURT: Was there an objection there?
[229]

Mr. WIGGENHORN: There was an objection made, and I did not let him answer. And I continued as I have just read.

The COURT: Well, I will sustain the objection on the ground that he says he had a faint recollection.

Mr. WIGGENHORN: Then he proceeds to answer, "As I remember." May I read that answer?

The COURT: Yes.

A. As I remember, we received a letter along in 1930 from Mr. Healow stating that he received a request by the Commissioner of Agriculture to furnish a bond in view of the fact that we were taking beans from the growers and issuing warehouse receipts and that led up to making application for the bond, and after this bond was issued I think that the bonding company mailed it to Mr. Healow and later on he wrote us.

Q. Well, now, I think that would be more or less hearsay. We won't go into that. I merely am trying to fix these times. Now then, as to the

(Testimony of H. E. Chatterton.)

faintness of your recollection or its accuracy, what can you tell us as to how authentic that recollection is? Might it be wrong? I am referring now as to whether or not any request was made by the Commissioner of Agriculture in January, 1930 for a bond?

A. Well, I might be wrong on that.

Q. But that is your present recollection?

A. Yes, sir.

Q. And you describe it as being faint?

A. Yes, sir; I cannot tell whether this request came from the Commissioner of Agriculture for a bond or not; but I know that Chatterton & Son was asked to furnish the bond.

Q. When you say "asked", do you mean asked by Healow, or by someone else? [230]

Mr. BENNETT: Just a moment, I am going to object to that as repetition. I believe the witness has already answered that he did not know whether the request was from the Commissioner or from Mr. Healow.

The COURT: Yes, sustained.

Q. Now that request, was that request communicated directly to you or through your company or through the medium of Mr. Healow?

A. Medium of Mr. Healow.

Q. So, I take it then that Mr. Healow would have first-hand information as to that?

A. Yes, sir.

Q. And what you have told us would be hearsay, I presume, from Mr. Healow?

(Testimony of H. E. Chatterton.)

A. Yes, sir.

Q. Or elsewhere?

A. Or elsewhere.

RECROSS-EXAMINATION

By Mr. BENNETT.

Q. Mr. Chatterton, you did not mean in your testimony here given on redirect to say that when you refer to a warehouseman that you mean only storage of beans as distinct from grain; you did not mean to testify to that, did you?

A. They do not store grain in warehouses.

Q. That is true, but when you refer to a warehouseman and when you refer to a warehouse receipt, it might cover both the storage of beans or grain, regardless of whether they are in the warehouse or otherwise?

Mr. WIGGENHORN: Object to that as immaterial. "Warehouseman" was not the expression referred to.

The COURT: Yes, sustained.

Mr. BENNETT: Exception. [231]

I do not mean to say that warehouses do not have sacked grain, or grain stored therein, because they do in some instances in a small way, but where grain is stored, it is stored in bulk in bins, because if it is stored in sacks the loss would be tremendous on account of rattice and such as that. Generally grain is kept in an elevator in bins. In Michigan we put beans in an elevator because the texture of

(Testimony of H. E. Chatterton.)

those beans is different than the western beans, and in this western country we could not take a chance on storing beans in an elevator. These beans that I am talking about are eating beans. They are what we term as dry beans, commercial beans for food and canning purposes.

B. M. HARRIS,

a witness called in behalf of the plaintiffs, being first duly sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

My name is B. M. Harris. I am in the banking business in the Yellowstone bank at Laurel, and also one at Columbus. I have been in the banking business since 1907 at Park City. I have been president of the Yellowstone Bank for about ten years.

I was one of the members of the committee chosen at the time Chatterton and Son closed in 1931. I remember the occasion. I was present at the meeting of the growers that has been described by Mr. Appleby.

I was concerned because through the bank we had made loans on warehouse receipts and we were concerned about our collateral security. We held these warehouse receipts as collateral. We likewise had customers in our bank that were involved in this warehouse.

(Testimony of B. M. Harris.)

The first knowledge I had of the closing of the warehouse came from Mr. Kober, who had a large number of beans in the warehouse in Billings. He was one of our customers and we had a loan on those beans. He told us that he was concerned about the [232] standing of the company. I suggested that he go down to Billings and check up on his beans, and he reported that the beans were being shipped out of the territory. He and I both came down to Billings where I first called the warehouse and was informed that Healow was out and that Calkins, the auditor, was in charge. We made [233] a demand for settlement over the telephone for the beans at the market. Calkins advised us that it was being handled by his attorney, H. J. Coleman of Billings, and to take up the matter with him.

Coleman said there were no funds to pay for these beans and that they were being shipped to Kansas City. We came to Billings and checked and found that the beans were being loaded, so we went to the county attorney and insisted on the beans being tied up. Part of them had gone out and part of them were on the track. The mass meeting of the bean growers was held after that, that is, after the demand.

We demanded the county attorney to take some action to hold the beans and also to take action against the auditor, Calkins, on the ground that it was larceny to move those beans out of the state

(Testimony of B. M. Harris.)

for which we had warehouse receipts. Calkins was arrested and furnished a bond and was released. Then we notified Stafford's office and called a mass meeting at the Commercial Club in Billings.

At this meeting a committee was appointed and, as suggested by Stafford, it was given a formal power of attorney by practically all growers. I think with very few exceptions they gave the committee, all three, authority to act in their behalf in recovering the beans, that is, to take any action necessary to recover.

The cars that were tied up in Billings were mussed up and in some way slipped out and got on their way to Kansas City. We waited about thirty days trying to get a settlement.

Before that, we notified Mr. Stafford's office. He was in Missouri at a funeral. Then the committee notified him that they were in Kansas City and he stopped there on his way back and checked into the status of those beans in Kansas City. That was some time [234] in July, 1931 when Mr. Stafford was in Kansas City. He reported that the beans were in a federal warehouse there. Well, he found them in Chatterton's warehouse. Chatterton and Son made no representation to us at all as to how the beans that had been shipped out were being held. Healow was out and Calkins was gone. Our only contact had to be through Kansas City. Stafford was taking care of the communications through Kansas City to see whether

(Testimony of B. M. Harris.)

they would pay for the beans. I don't know what happened, but no settlement was made.

Mr. BENNETT: Defendant is willing to stipulate for the purposes of this record that between the 20th and 25th of July, 1931, demand was made on Chatterton & Son for the beans or their value, and Chatterton & Son failed and refused to re-deliver or return said beans, excepting as plaintiff's testimony will show that they accounted for them, and excepting as the testimony shows Chatterton & Sons settled for them by assigning all of their assets.

I eventually went to Kansas City myself to recover on the storage tickets. You, Mr. Wiggenhorn, were with me in the capacity of the attorney for the growers. When we were in Kansas City we spent the entire forenoon with the attorney for Chatterton and Son, at which time he outlined the financial status of the company, showing that they were helplessly involved, that it was out of the question to replace or to pay these claims with beans, that the beans had been sold.

He told us there were approximately ten thousand bags of beans left which were in the warehouse in Kansas City under the supervision of the Radial Warehouse. [235]

The beans on hand had been hypothecated to the bank at Kansas City and they had to pay transportation to Kansas City and to pay Calkins out of it to keep him out of jail.

(Testimony of B. M. Harris.)

There were approximately eighteen cars involved in that last shipment to Kansas City by Calkins. It might have been twenty-two or twenty-three. We could account for about ten thousand bags of beans at Kansas City, but they were in the process of going. There were about twelve thousand bags shipped out by Calkins in the last year. The representatives of Chatterton and Son told us that the beans had been sold on a falling market and were just paying warehouse receipts as they were presented in these various territories until they had washed out with this bunch of beans in Billings.

They had warehouse receipts all over the Billings territory and part of Wyoming and they used those warehouse receipts in Kansas City. The beans represented by the warehouse receipts had been sold.

We did not take the warehouse receipts with us, but we took the records. We checked the beans in the warehouse and they did not check with the record, although they attempted to identify the beans. This was in the Chatterton warehouse. The secretary of the company went with us. We did not know our way about and someone from Chatterton and Son took us up to a pile of beans and said, "Here they are."

This was a large terminal warehouse in Kansas City only partially filled. There was a cleaning plant in operation and beans going to this cleaning

(Testimony of B. M. Harris.)

plant daily. The beans were stacked on the floor, part of them with Billings growers names on them, but the sacks did not check as to grades and they didn't check as to number of sacks. We were hopelessly at sea in trying to reconcile [236] the warehouse receipts at Billings with the sacks of beans at Kansas City. We could not identify a single sack for any particular grower.

In settlement, Chatterton and Son turned over to us first the equity in the warehouse beans on hand; that is, these beans were pledged to the bank in Kansas City. Before we could get any money out of them, they had to be sold and the pledge paid. We realized approximately ten thousand dollars from the ten thousand bags after the lien was paid. The lien was largely freight. We also got an assignment of the contract notes for some five thousand or fifty-five hundred dollars. That represented the sale price of the office equipment and good will, I mean the sale from Chatterton and Son, Inc., whose name had been changed to Gerson and Company and to the new Chatterton and Son.

We collected practically all of this, although the payments were slow and I made a second trip to Kansas City about two years later. They had to get the balance of the money from the San Francisco partners to clean up the notes. We realized about seven thousand dollars on the notes. These notes were given for bags and equipment

(Testimony of B. M. Harris.)

mostly. We had an assigned claim of the Occident Elevator in Billings. We cashed in six hundred dollars on that. We had an assigned claim from the Aetna Insurance Company for twenty-two hundred dollars for the Calkins bail bond. In order to indemnify the surety company, Chatterton and Son had to put up cash with the surety company, and after the charges were dismissed, that was turned over to us. Total amount collected was twenty-six thousand, four hundred dollars.

The committee had an expense of about thirty-three or thirty-five hundred dollars. That included attorney's fees and travelling [237] expenses. The attorneys fee was fifteen hundred dollars, with some expense account. The Department of Agriculture was short of funds, so we paid the expense of Moran from Great Falls and part of Stafford's expense. An audit of the account cost us three hundred dollars. The committee received practically nothing for their services. I received my expense account and the bank charged a service charge of about four hundred dollars. I would say that the whole amount was chargeable to the pursuit and recovery of the beans.

Mr. Stafford interceded in the first place and suggested that in order to make the formal set up we get a power of attorney from all growers, delegating the committee appointed at the Commercial Club to act in their behalf. Every grower of record was notified and I think every grower

(Testimony of B. M. Harris.)

signed up a power of attorney and at the same time sent in his warehouse receipt authorizing this committee to take such action as was necessary to recover the money and employ counsel for that purpose. We had authority to engage counsel.

The committee proceeded to collect and establish the amount of every loss and retain counsel to bring this action. Mr. Stafford went out of office a year ago. There has likewise been a change in the Attorney General's office. We first made application to Stafford to bring action on the bond and the matter was referred to the Attorney General's office, who agreed to bring this action for recovery. I think a claim was filed with the receiver of Chatterton and Son in Michigan. There has not been any collection from that source whatever. There has been nothing received or collected except what can be collected on the bond. [238]

CROSS-EXAMINATION

By Mr. BENNETT.

There are no assets left. We had exhausted everything in our possession. We disbursed the money in accordance with the power of attorney; dividend number one on the basis of a dollar a sack and dividend number two on the basis of forty cents a sack and we now have about forty-five hundred dollars cash on hand for distribution.

There was about a ten percent differential between payments on number one beans and number two beans. We have paid a total of about one

(Testimony of B. M. Harris.)

dollar and forty cents a sack on ninety-eights, and a proportionate reduction for ninety-sixes and ninety-twos.

We collected approximately twenty-six thousand four hundred dollars. Our expense was around thirty-four or thirty-five hundred dollars.

REDIRECT EXAMINATION

By Mr. WIGGENHORN.

This was the way we worked out the settlement. Some beans had no advance on them whatever. Other beans had advances up to four dollars a sack. In order to make an equitable settlement with the ticket holders, we eliminated all claims over a dollar in the first place and made the first distribution to the fellows that received less than one dollar; and the second distribution was made to the fellows that received less than \$1.40.

In making our distribution we took into consideration the advances that had been made to the various growers. That is, if a man had received fifty cents a sack in advance, then we would only give him fifty cents more to make it a dollar. But if a man had received nothing, we gave him a full dollar per sack. If he had received over a dollar, we gave him nothing. This first dollar dividend embraced only a restricted number of growers, depending upon whether [239] they had had an advance or not. The next dividend of forty cents embraced a larger number because it took into

(Testimony of B. M. Harris.)

consideration whether they had received \$1.40 in advance or not, and if they had, they got nothing.

RECROSS EXAMINATION

By Mr. BENNETT.

Every man got \$1.40 either by way of an advance or by dividend.

REDIRECT EXAMINATION

By Mr. WIGGENHORN.

We paid out approximately ten thousand, seven hundred dollars on dividend number one, and about seven thousand on dividend number two.

RECROSS EXAMINATION

By Mr. BENNETT.

There were more who came under dividend number two than dividend number one because there were seven thousand bags involved, for instance, that had no advance of any kind. They participated in the first dividend to the extent of the full dollar. There were approximately forty thousand bags in outstanding storage tickets. There were no new growers came in for the first dividend. The list of growers and the list of losses were fixed, and whether they came in on the first or second dividend, the liability was fixed.

Witness excused.

W. W. LINDSAY,

a witness called for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. WIGGENHORN.

My name is W. W. Lindsay. I live here at Billings and I am a public accountant. I was employed by Mr. Stafford to audit the books of Chatterton and Son in 1931 when the warehouse was closed. The records of the company were turned over to me at that [240] time. I audited them and made a report from them. It took quite a lot of work. From the records and books of the company I made up a report that I submitted to Mr. Stafford, Commissioner of Agriculture.

Plaintiff's Exhibit 18 I believe is the original report, although it might be a copy of it. There were several copies made.

The first column shows the names of the bean growers from which I found warehouse receipts giving the number of sacks, etc. The list shows all of those for whom I found warehouse receipts in the records. The next column shows their addresses. The next column gives the total number of sacks that the warehouse receipts called for. It is designated as "No. Sax." The next column shows the grade as stipulated on the warehouse receipts. All of the warehouse receipts were called in and made available to me. The duplicates, of course, were in the records. The next column

(Testimony of W. W. Lindsay.)

shows the date of shipments of beans to Kansas City, according to the record of Mr. Healow. The next column shows the net weight of the sacks. When a bean grades ninety-six or better, it represents one hundred pounds to the sack.

We go down to the first 95. That happens to be Jake Benner, and he is credited with 320 sacks. If it was a hundred pounds to the sack, that would be 32,000 pounds. But the record shows only 30,400. In cases of that kind, they always figure those beans—at least that was the information imparted to me—they would figure out five per cent. Raise it up to a hundred; 32,000 pounds. Five per cent would be 1600 pounds. Subtract the 1600 pounds from the 32,000 pounds and you have the net weight of 30,400 pounds, as shown there.

That is to say, in this specific instance, you figured five per cent because the lot of beans is graded at 95, which means that five per cent of his beans were thrown out by the hand picking process, and that five per cent deducted from what would otherwise be the total of his beans, 32,000 pounds,—you arrive at [241] the 30,400 net weight. So that, in conclusion, we may say that, except for all beans grading ninety-six per cent or better, which would be a marketable bean immediately, where they graded ninety-six per cent, in reckoning the net weight you deducted that percentage of beans that would necessarily be picked to bring them up to a hundred per cent to arrive at your net weight. I

(Testimony of W. W. Lindsay.)

made this calculation for each individual grower, as an individual item and it is represented in my report here. [242]

The next column shows the market value at the time of shipment. I arrived at those figures from the prices that were stipulated on different various warehouse receipts given out by Mr. Healow on those particular dates. They were available in the Chatterton records.

The next column indicates the total net value after the hand picking reduction, that is, after deducting the five or eight per cent, or whatever it happens to be, in arriving at the net.

The next column shows the cash advances made. The next column shows miscellaneous charges, that is, some of it was for seed, and also for taxes. The last column shows the balance due at time of conversion. I arrived at this figure from the date of shipment to Kansas City.

The first one shown here is Winifred Annin, who had twenty-two sacks of beans graded at ninety-six, which means there would be no hand picked deduction. They were shipped on October 13, 1930. The gross weight was twenty-two hundred pounds. The market value at that date was four dollars. The total net value after hand picked deduction is eighty-eight dollars, or four dollars a sack. It shows a fifty-five dollar cash advance. Deducting that from eighty-eight dollars, you have thirty-three dollars, that being the balance due at

(Testimony of W. W. Lindsay.)

the time of conversion, and the same is true of the other growers as their claims are shown here on this report.

On the last page I have a form of recapitulation. In the column to the left I segregated all of the four fifty beans and four twenty-five and on down as low as two dollars, which was the lowest I noted on the warehouse receipts. This two dollar item represents ninety-six per cent beans, and I have separated, as appears here, all of the beans, classifying them by prices and the gross amount for each price classification. [243]

The gross amount as shown is 3,859,935 pounds, totaling \$118,685.86, which was the total value of the beans. Deducting the total amount that it figured out for the hand picked charge at ten cents per pound, it was \$12,678.03. This I deducted from the value of the beans, leaving \$106,007.83. The total advances were \$38,155.18. The miscellaneous charges were \$2,009.08, totaling \$40,164.26, which deducted from the net amount leaves a balance due the owners of beans in the amount of \$65,843.57.

This report and the computations contained in it are based upon the theory that the beans were converted at the time of shipment from Billings. That is what was told to me at the time and that is what I based all my dates and figures on. Plaintiff's Exhibit 18 is the one I submitted to Mr. Stafford.

Mr. WIGGENHORN: We offer, then, in evidence Plaintiff's Exhibit 18.

(Testimony of W. W. Lindsay.)

Mr. BENNETT: May I ask some questions before this is received, Your Honor?

The COURT: Certainly.

VOIR DIRE EXAMINATION

By Mr. BENNETT.

I am not a certified public accountant.

In my testimony I did not say "that is what they told me." In my testimony I said that the two dollars in those different owners was the prices that I found and the prices that I set on the different bean owners' beans at the date they were shipped to Kansas City. If the price of a ninety-eight bean was \$2.25, the regular prevailing price of the other was two dollars. This information was given to me by Mr. Healow and I think was shown in some of the other records. The prevailing price on a certain date I got from the records. [244]

I am not a bean man but it is characteristic, so far as I know, to figure the weight by subtracting. I could not say that part of this report and the calculations contained were based upon what was told me as to the manner that beans are handled. The market value on a given shipment and the dates therein contained, I procured from the warehouse receipts. The date of the shipments was shown in the sort of records of Chatterton and Son.

(Testimony of W. W. Lindsay.)

I have none of the original records with me. The records I went through, besides the duplicate warehouse receipts, were original warehouse receipts. The miscellaneous column I got from Chatterton's records, and they are correct. The column showing the advances I got from Chatterton's records. The amount of beans and the grades were also on the original receipts. This report was signed by me. I think this one is the original. I wrote a letter to Mr. Stafford and sent this to him.

DIRECT EXAMINATION RESUMED

By Mr. WIGGENHORN.

The records I have referred to are voluminous; in fact, they filled most of my office. I think I worked on this report for a month and a half, off and on.

Mr. BENNETT: If the Court please, I want to just object to the report as a report, in so far as the calculations shown in there are matters that were told him, in that for that reason the record as a whole does not appear to be merely ledger or book records taken from the books of the company.

The COURT: Well, I got that impression too, on the direct examination. But on the cross examination he explained the source of his information, and it does seem as if it came from the books and the [245] records that, under the system of conducting the business, that he must necessarily learn in going through the records.

(Testimony of W. W. Lindsay.)

Mr. WIGGENHORN: I think, Your Honor, you will find in going through the record that he was very careful in what information was given to him. He was merely asked as to the method. For example, I brought out that when he arrived at this price that he bases it upon the theory—something I, myself, told him for instance—that the conversion took place on the day of the shipment. Now, I merely told him, “You figure this out on that basis.” And I think you will find that is true of all his statements where he says, “They told me.” But the fact basis, I think, is authentic and the testimony will bear it out completely.

The COURT: I gathered that on the cross-examination. I thought Mr. Bennett went over pretty carefully with him those different matters, and I don't see how one could say it was hearsay or something somebody told him. I think I will overrule your objection.

Mr. BENNETT: Note an exception. [246]

EXHIBIT 18.

[PRINTER'S NOTE: Exhibit 18—Report on Chatterton and Son Storage Beans here set forth in the typewritten record is already set forth in the printed record at pages 18-21, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [247]

(Testimony of W. W. Lindsay.)

I also made computations figuring that the date of the conversion took place at the time the warehouse closed, at which time the price of beans was \$2.25 for a number ninety-eight bean, and \$2.05 for a ninety-six per cent bean. In arriving at this, I excluded from consideration all beans upon which there had been an advance of more than \$2.25 for ninety-eights or \$2.05 for ninety-sixes. I did not take into consideration advances of \$2.25 or \$2.05.

Q. Now then, taking into consideration only those beans that you thus had left after excluding the ones that had had an advance of \$2.25 for ninety-eights and \$2.05 for ninety-sixes, and considering a flat price of \$2.25 for the remaining beans that graded number one on that date, and \$2.05 for the remaining beans that graded ninety-six, and taking into consideration also the hand picked charges as deductions that you have already testified to, and deducting those; and deducting also the total advances and charges against those beans, did you arrive at the net value based upon that \$2.25 base price?

Mr. BENNETT: Just a moment?

A. Yes, sir.

Mr. BENNETT: I will withdraw the objection.

Q. Now you may look at your own tabulations here, and I will ask you now to state what that net value thus calculated is?

(Testimony of W. W. Lindsay.)

Mr. BENNETT: Just a moment? Objected to, if the Court please, for the reason that there is a so called apparent hypothetical question, based on assumption of facts which I do not believe are proven, in trying to have this witness arrive at the measure of damages on a legal question; and also object to this as merely an opinion and conclusion of the witness, and not competent or material to the issues in this case. [252]

The COURT: He is arriving at a different basis on a different date? That is, this is the date of the closing of the warehouse?

Mr. WIGGENHORN: Giving ourselves the worst of it, Your Honor.

The COURT: Yes, that is what I thought.

Mr. WIGGENHORN: On the theory that if they say all they had to answer for was the price on the date of the closing of the warehouse; and presenting this matter to him for calculation, I ask him to state his conclusions from calculations.

The COURT: This theory is based upon facts, the same as the other?

Mr. WIGGENHORN: Absolutely, based upon facts, and against our interest. That is true. I want to say this to counsel, that this is a matter of calculation, and the Court has the right to calculate it for himself. That is to say, the report already in evidence discloses the facts that the witness himself used in the calculation, and it would take an accountant to figure it out. And I think there is no question, when we have such a compli-

(Testimony of W. W. Lindsay.)

cated set of figures, when they can be confirmed, that counsel or the Court can sit down and compute it. But I understand the witness can testify as to his calculation, for the convenience of the Court. Of course, it can all be checked. If it don't work itself out, it can be disproved by counsel.

The COURT: I will overrule the objection. [253]

Mr. BENNETT: Exception.

Q. Do you have the question in mind?

A. What was the question?

(Question read.)

A. \$37,260.76.

CROSS-EXAMINATION

By Mr. BENNETT.

Q. Mr. Lindsay, on your tabulation there, have you worked out any tabulation figuring the date of the conversion, say, the 15th or 17th of July, 1931?

A. I didn't quite get your question.

Mr. WIGGENHORN: Object to that question, Your Honor, because there would be no basis for the witness to make that computation; because he had no information to make that computation on.

Q. Well, let me ask you this question? Is this calculation that you are talking about there based on the market price of the beans around the 15th day of July, 1931?

Mr. WIGGENHORN: We object to that, Your Honor; the witness being incompetent to answer it, not qualified. His testimony shows that it is not

(Testimony of W. W. Lindsay.)

based upon a value at any given time. It is based upon a fixed hypothetical value of \$2.25. It is not for this witness to say what the value of beans is on a given day, not being qualified.

The COURT: I think so. I think that is apparent.

Mr. BENNETT: Exception.

Q. Mr. Lindsay, how do you arrive at the basis of \$2.25 as an hypothetical value to make your computation? [254]

Mr. WIGGENHORN: Objected to again, Your Honor, because that is the value I arbitrarily submitted to him for what it is worth. It isn't for him to arrive at. I arrived at it and the Court may or may not.

The COURT: I will have to sustain his objection.

Mr. BENNETT: Exception.

Q. Mr. Lindsay, did you fix the date as of July, 1931?

A. I did not.

The COURT: No, that is not it at all. He has just fixed a price. That is all there is to it.

From the records it was possible to determine whether or not any of the beans were actually sold to Chatterton and Son. There are none listed on the report if it was an actual outright sale. None of the actual sales are on this list. I found the cash advances as shown on Exhibit 18 from their records. I don't remember exactly what records the cash advances were in at this time, as that

(Testimony of W. W. Lindsay.)

was nearly five years ago and this has never been brought to my attention until four or five days ago. I got this from all of the different records there.

Witness excused.

B. M. HARRIS,

recalled as witness for plaintiff, having been previously sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

At the time the warehouse closed the prevailing prices were \$2.25 for ninety-eights and \$2.05 for ninety-sixes. That was the price we got for the first beans sold in Kansas City. Afterwards the prices dropped. This price did, however, prevail for thirty days after the closing of the warehouse, that is, \$2.25 for ninety-eights and \$2.05 for ninety-sixes. [255]

CROSS-EXAMINATION

By Mr. BENNETT.

That was the price per hundred pounds.

Mr. WIGGENHORN: Plaintiff rests, Your Honor.

Mr. BENNETT: At this time, counsel for the defendant, Fidelity and Deposit Company of Mary-

land, moves for a dismissal of this action on the grounds of failure to state or prove a cause of action, either in equity or law, against this defendant; for failure to prove that the so called plaintiff is a true party, and for failure to show the capacity of the plaintiff to bring this action or in any way connect the plaintiff to the case and issues herein.

And for a further ground, for failure to prove that there is any compliance with the statutes of the State of Montana covering this so called action.

The COURT: Well, the Court will take that under advisement—that motion. The Court will consider that motion in the case when it is submitted.

(Thereupon, documents were presented by counsel for defendant and marked as follows: “Defendant’s Exhibit 23; Defendant’s Exhibit 24”; and “Defendant’s Exhibit 25,” for identification.)

Mr. BENNETT: We offer in evidence defendant’s exhibits, marked for identification “23, 24,” and “25,” purporting to be a letter from Healow to the Department of Agriculture, and a letter from the Department of Agriculture to the Secretary of the Montana Bean Dealers at Billings, and a letter from the Department of Agriculture to R. J. Healow: [256]

EXHIBIT 23.

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

R. J. Healow April 28, 1931.
Mont. & Wyo. Mgr.
Department of Agriculture,
Helena, Montana.

Dear Mrs. Morris:

This will acknowledge receipt of your recent letter relative to the warehouseman's bond.

We are taking this matter up again with our Kansas City office and also with the Company who writes our bonds. Will endeavor to get prompt action on the same.

Yours very truly,

CHATTERTON & SON, INC.
(signed) R. J. HEALOW

RJH:BH

EXHIBIT 24.

COPY

Helena, Montana
April 14, 1931

Dorothy Gray Johnson, Secretary,
Montana Bean Dealers,
Billings, Montana.

Dear Mrs. Johnson:

This will acknowledge receipt of your letter of

April 9 and I have been discussing this matter with the Commissioner of Agriculture and the Attorney General before replying.

Since Mr. Stafford and I were in Billings we have had considerable correspondence with bean dealers, and with the exception of a very few they positively state that they do not store beans for the public. You are familiar with the agricultural seed warehouse act and understand that it covers only those who store and therefore we would have no jurisdiction over dealers who buy and sell and do not store. This is the opinion of our Attorney General. For several years we have been notifying the various dealers recommending that they observe this law, but only a few have complied, so you see the matter has not been neglected by this department.

There are so few who come under this act that it seems to me that it would be disastrous for the department to set rates for storage, handling and cleaning and so long as the law does not cover this point it would be impossible to enforce it. As to a uniform storage ticket for the few who will use it, I would recommend that you send a sample of the ticket you have been using for the approval of the Commissioner and the Attorney General. This has been done in a few instances. No doubt as the industry grows the dealers will see the necessity for a [257] change in the laws and make laws accordingly. In the meantime if you would keep

me posted as to who is storing beans in your locality I would endeavor to keep the bonds up to date.

Your statement as to the lax supervision of elevators is badly in error. All elevators handling stored grain are bonded, they file reports each month and bonds are filed according to liability. Out of practically 600 last year, one elevator got away from us, shipping their grain within a short period without permission from this department, giving us no opportunity to provide for additional bond. This happens in cases of banks or any business institution, even when inspectors are in the field giving close supervision. However, in the case I mentioned a charge for larceny has been filed so your statement seems unfair to me that the attitude should be taken that state bonds have not protected the growers. It is thru cooperation of our elevators that we keep a check on who is *operation* and who is not and the state can protect the bean growers in the same way if they will furnish us information as to who comes under bond or who is storing.

I am in accord with your judgment that it would be bad policy to go in and establish a uniform system as at this time we have so little knowledge as to the general practice of handling beans. Later after we have given the matter study the department and the bean growers may feel that supervision is necessary, but until that time I feel that supervision should extend entirely to keeping those storing

beans under bond, and with your help I am sure this can be done.

Very truly yours,

(signed) TOILIE MORRIS
Chief—Division Grain
Standards

TM-C

EXHIBIT 25.

COPY

April 24, 1931

R. J. Healow, Manager,
Chatterton & Son,
Billings, Montana.

Dear Mr. Healow:

In answer to your letter of April 21 I have called on the Secretary of State, and I find that last year Chatterton & Son filed their articles of incorporation with that office, but this in no way covers their operations as public warehousemen under the Warehouse Act. Whenever a corporation enters the state under the law they must file their articles with the Secretary of State's office and pay a fee, and this is no doubt what the company had in mind when they wrote you.

Very truly yours,

Chief—Division of Grain
Standards & Marketing

TM:C

Mr. WIGGENHORN: We object to defendant's Exhibit number 24, only, on the ground it is immaterial. The others are not objected to. And I might explain further, properly, my objection is only based upon the ground that, whether or not the Commissioner of Agriculture took the view that the principal in this bond did or did not come under his regulations is entirely immaterial.

The COURT: Well, it may go in subject to your objection, and I will consider it when I consider the rest of the case and these exhibits.

AUSTIN JENISON,

a witness called in behalf of the defendants, whose testimony was taken pursuant to stipulation of counsel upon written interrogatories by deposition, being first duly sworn, testified as follows:

My name is Austin Jenison; I am forty-two; I reside at 1608 Osborn Road, Lansing, Michigan. I am in the insurance business and have been in the insurance business for nineteen years.

In 1930 I was an officer of the Dyer-Jenison-Barry Company, insurance brokers. I was co-manager of the casualty and surety company. In 1930 I did some business with Chatterton and Son at Lansing, Michigan. It consisted of insurance and surety bonds.

(Testimony of Austin Jenison.)

In 1930 my firm were agents for the Fidelity and Deposit Company of Maryland. On or about January 7, 1930 I procured a surety bond for Chatterton and Son as principal, upon which the Fidelity and Deposit Company of Maryland was surety. I was requested to obtain the bond by one of the officers of Chatterton and Son, and after considerable correspondence with the home office and the Detroit branch of the Fidelity and Deposit Company, the bond was written on forms supplied by the State of Montana. [259]

Q. State, if you know, to whom said bond ran and kind of a bond it was?

Mr. WIGGENHORN: Plaintiff objects to direct interrogatory No. 10 on the ground that it is not the best evidence and the bond speaks for itself in this regard.

The COURT: Did he have the bond before him when this deposition was being taken? Read that question again?

(Above question read).

Mr. WIGGENHORN: I will add to the objection, calling for a conclusion as to the kind of bond it was.

The COURT: I think I will overrule the objection. He drew the bond. He has qualified himself to say what kind of bond it was, whether it was surety bond or what. Read the answer.

(Testimony of Austin Jenison.)

A. Assuming that Exhibit B is a copy of the bond supplied, it was furnished to the Division of Grain Standards and Marketing of the Department of Agriculture, Labor and Industry of the State of Montana and was known as a Public Warehouseman's Bond. This written application for a Public Warehouseman's bond, marked for identification as "Defendant's Exhibit A", is a true and correct copy of the application of Chatterton and Son for said bond above referred to. This Public Warehouseman's bond, marked for identification as "Defendant's Exhibit B", seems to me to be a correct copy of the bond procured by me and referred to herein.

(Exhibit "A" here is in evidence as Plaintiff's Exhibit "A" at page 95, and Exhibit "B" above is here in evidence as Plaintiff's Exhibit 2 at page 13.)
[260]

Q. If you are able to identify the same, I will ask you whether or not, as far as you are concerned, there is any mistake in the form, wording and/or contents of said written Application and Bond?

Mr. WIGGENHORN: Objected to on the ground that it calls for a conclusion and as incompetent, and not the best evidence.

Mr. BENNETT: If the Court please, in this complaint they ask for reformation on the grounds that there was a mutual mistake of fact between the party issuing the bond and the people out here;

(Testimony of Austin Jenison.)

that they intended the word "beans" to be written in instead of "grain", and for that reason have asked this Court for a reformation. I don't know any more direct way than to ask the man who had the bond issued.

The COURT: I will consider that later, subject to the objection to it.

A. No. [261]

Referring to the next to the last clause of Exhibit B, wherein the following wording is used: "Now, therefore, if the said Chatterton and Son shall indemnify the owners of grain stored in said warehouses against loss," I will state that I did not intend to use the word "beans" instead of the word "grain" in said sentence.

Q. State whether, at the time you procured said bond, defendant's Exhibit B, you intended said bond as one for the protection of the owners of beans, instead of the owners of grain?

Mr. WIGGENHORN: Objected to upon the ground that the question assumes that the word "grain" is not a generic term, and it assumes that it does not include in its meaning the word "beans."

The COURT: Well, I will consider it later. I will receive it subject to the objection made, and I will disregard it or consider it.

A. No.

At that time I was familiar with the bean business of Chatterton and Son. They were brokers of beans, grain, hay and some produce.

(Testimony of Austin Jenison.)

On January 7, 1930 I did not know that Chatterton and Son's business was limited to the handling of beans in the State of Montana. It was my general impression that their business in Montana was a branch of their Lansing business, handling the same produce as was handled in Lansing.

CROSS-EXAMINATION

In January, 1930, and for a long time prior to that, I was well acquainted with Mr. H. E. Chatterton, the president of Chatterton and Son. I was an intimate friend of his and associated with him socially. [262]

I also had close business contacts with Mr. Chatterton and with Chatterton and Son. We wrote practically all of his bonding business. I was also an intimate friend of Mr. Madsen, the secretary of Chatterton and Son, of Mr. Stickle, vice president of Chatterton and Son, and Mr. Reynolds, the attorney for Chatterton and Son. I presume that Mr. Stickle was the manager of the bean department at that time.

As a result of our business and social contacts, I was familiar with the character of the business of Chatterton and Son in a general way. I knew the company was engaged in the bean business and was reputed to be one of the largest bean jobbers in the country. I knew the company had opened up a western branch, but did not know it was exclusively for the handling of beans.

(Testimony of Austin Jenison.)

Q. Did you not in fact know and understand that Chatterton & Son were not engaged in operating any grain elevators in the State of Montana or in any of their western branches?

A. No.

Q. If, in answer to any of the questions, you have stated that you understood that the business of Chatterton & Son in Montana was the handling of grain or of grain and beans both, will you please state who ever told you that the Company handled grain in Montana or where you got that information or that impression?

A. I assumed they handled the same commodities they handled in Lansing and I do not recall that anyone in particular discussed the matter definitely.

Q. I call your attention to the written application of Chatterton & Son for this bond in question, and particularly to the statement therein that the nature of the bond sought was a public warehouseman's bond. Did you or any one on behalf of your firm, at the time, inquire particularly as to what kind of a warehouse was there meant or was intended to be covered by the bond, and for the storage of what kind of goods or property; and if you did obtain any such [263] information, state who furnished the information to you and what you learned in that connection?

A. No, but the fact that a so-called public warehouseman's bond was supplied by the State of Montana gave me the general impression that various

(Testimony of Austin Jenison.)

commodities were to be stored in the warehouse.

Q. In supplying this bond, was it of any interest to you or to your firm to determine precisely whether beans or grain were to be stored in the warehouse to be protected by the bond?

A. No. It would make no difference to me, but it might to the bonding company. [264]

Mr. WIGGENHORN: If Your Honor please, I ask that the answer to interrogatory number 16—that everything be stricken therefrom after, “No, it would make no difference to me?” Striking particularly the words, “but it might to the bonding company,” as not responsive to the question asked, and purely argumentative.

The COURT: Yes, strike it out.

Mr. BENNETT: Exception.

Q. In furnishing the bond, did it, in fact, make any difference to you or your firm or enter into your decision to write the bond, whether the property to be stored in the warehouse was to be wheat or other cereal grains, or beans, or both?

A. I can answer that it would make no difference to me, but it might to the bonding company.

Mr. WIGGENHORN: Again, I ask that the words, “but it might to the bonding company,” be stricken from the answer as not responsive, and argumentative.

The COURT: Yes, it isn't responsive. Let it go out.

Mr. BENNETT: Exception.

(Testimony of Austin Jenison.)

I received several letters from Mr. Healow, manager of the Billings warehouse of Chatterton and Son, over a period of several months, but I would not be able to identify the month without referring to my file.

The first letter from Mr. Healow is dated December 17, 1929, written from Billings, Montana; written, however, to Chatterton and Son and forwarded to me, "Austin Jenison please note," which I am having marked "Exhibit C," and offered as an exhibit. There is another letter dated April 28, 1931, from R. J. Healow to Dyer-Jenison-Barry Company, which I am having marked "Exhibit D," and [265] offered as an exhibit. These are the only two letters which I find in the file from Billings, Montana, relative to this bond.

Q. Did not the letterhead in fact show and state Chatterton & Son to be or claim to be the largest bean dealers in the world?

A. The letter, Exhibit C, did not so claim; while the letter, Exhibit D, did make the claim.

Q. Please produce the letter or letters, mark them for identification, and attach them to your deposition as exhibits.

A. I have so marked and produced the letters.

Mr. BENNETT: We now offer the two letters attached to that deposition as evidence, Exhibits C and D.

(Testimony of Austin Jenison.)

EXHIBIT C.

CHATTERTON & SON

Beans, Grain, Hay
and Produce

R. J. HEALOW

Manager

Billings, Montana

December 17, 1929

Chatterton & Son,
Lansing, Michigan,

Dear Mr. Madsen:

This will acknowledge receipt of your letter regarding the bond in connection with the warehouse license.

You might have the Dyer-Jenison & Barry Company mail the bond to this office and we will remit the necessary funds to obtain the license.

Yours very truly,

CHATTERTON & SON,

(signed) R. J. Healow [266]

RJH:BH

(Testimony of Austin Jenison.)

EXHIBIT D.

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

R. J. Healow,
Mont. & Wyo. Mgr.

April 28, 1931

Dyer-Jenison-Barry Co.,
Lansing, Michigan.

Attention: Mr. Jenison,

Gentlemen:

Your letter of April 8th, 1931 addressed to Mr. H. E. Chatterton at North Kansas City, has been mailed to us relative to a warehouseman's bond which we should have filed with the Secretary of Agriculture at Helena, Montana.

We note in the fourth paragraph of this letter where you mention a warehouseman's bond. We have taken this matter up with the Secretary of Agriculture at Helena and he called on the Secretary of State relative to this bond. He informed us there never was a warehouseman's bond filed in Montana by Chatterton & Son.

We would like to have this matter straightened out and have taken the privilege of writing you direct instead of having the correspondence go through the Kansas City office.

(Testimony of Austin Jenison.)

We would appreciate a reply and kindly ask that you send a copy of the correspondence with us to our Kansas City office.

Yours very truly,

CHATTERTON & SON, INC.,

RJH:BH

(signed) R. J. Healow

Mr. WIGGENHORN: No objection.

The COURT: They will be received.

Mr. BENNETT: The defendant rests.

The COURT: Any rebuttal?

Mr. WIGGENHORN: None, Your Honor; but I would like to make a record as to findings. Plaintiff at this time, at the close of the evidence, requests the Court to make findings in favor of the plaintiff, as follows: [267]

That it is the intention of all parties, including the defendant company, in using the word "grain" in the bond in question in its broad and generic sense, to include beans; and that all parties concerned meant to include beans in particular.

That it be further found that by mistake the word "grain" was used, although probably not the most appropriate word; and that the precise agricultural commodity, whether beans or wheat, was of no consequence to the defendant, and did not enter into its consideration in writing the bond.

That the Court further find generally on all of the facts for the plaintiff.

And plaintiff further asks, as conclusions of law, that the Court find that the defendant intended by the bond and continuation certificate to indemnify the owners of stored beans, and particularly the persons named in Plaintiffs' Exhibit 18, against the loss of the beans and the failure to deliver them upon demand or to account for the same.

That the Court further conclude that the bond should be reformed by changing the word "grain" to the word "beans"; and that the Court find that the bond was duly delivered and became effective and binding upon the defendant during the entire time while the beans in question were delivered to Chatterton & Son, or Chatterton & Son, Incorporated, for storage and at all times since. [268]

That the condition of the bond was breached and its penalty has attached; and that the plaintiff is entitled to recover the sum of ten thousand dollars, with interest at six per cent. since July 16, 1931, as prayed for; and that judgment be entered accordingly.

Mr. BENNETT: If the Court please, at this time I would like to renew, for the purposes of the record, the motion to dismiss that we made at the close of the plaintiffs' evidence, on the grounds therein stated, and on the further grounds that there is no proof shown anywhere that this bond covers the plaintiff, or that there was any mistake in fact as between the plaintiff, The State of Montana, herein and the defendant; that there is a defect in parties, in that the State of Montana shows

no basis for making a claim under this bond, the bond not having been approved and filed and no license issued, as required by the laws of the State of Montana; and on the further ground that Chatterton & Son was a necessary party to this action, and has not been joined.

The COURT: Well, I will take that motion under advisement.

Mr. BENNETT: If the Court please, under my view, we have a mixed case of equity and law, and I have not prepared any application for findings of fact and conclusions of law. [269]

The COURT: Well, you may do so.

Mr. BENNETT: May I have ten days in which to prepare and offer findings?

The COURT: Yes.

(Discussion off the record as to time necessary for submission of briefs.)

Mr. WIGGENHORN: I will take 15 days, if that is agreeable.

Mr. BENNETT: I will take 15 days from time of receipt of his brief.

The COURT: Very well, then, and 15 days for reply, if necessary. And we have a Court rule which provides that preceding the argument there should be a succinct statement of the facts; that is, I mean the material things to be considered, so that they will all be brought prominently to the attention of the Court right at the beginning. Some lawyers don't always follow that rule. But if you will, make a very brief statement, and that brings

the salient features right out prominently at the beginning of the brief. You gentlemen probably would do that to begin with. I haven't seen that rule for a long time, but I just happened to think that it isn't a bad idea. Well, that seems to be all.
[270]

And thereafter, on the 5th day of February, 1936, the defendant did file its proposed Request for Findings, as follows:

“REQUEST FOR FINDINGS.

Comes now the defendant in the above entitled cause and hereby requests the Court that, in rendering and making its judgment in the above entitled cause, which has been submitted to the Court, said Court makes specific findings of fact and law upon the following issues included in said cause, as follows:

FINDING OF FACT.

I. That for many years prior thereto and during the years 1929 and 1930 Chatterton & Son was a corporation, engaged extensively over the United States, buying, handling and storing of beans, grain, hay, coal and building materials, with principal place of business at Lansing, Michigan.

II. That on or about the 7th day of January, 1930, said Chatterton & Son, by written application, signed by H. E. Chatterton, President, and A. H. Madsen, Secretary of said company, made application to defendant, Fidelity and Deposit Company

of Maryland for a Public Warehouseman's bond to the State of Montana.

III. That on the 7th day of January, 1930, pursuant to said application, a bond was executed by defendant to the State of Montana to qualify Chatterton & Son under the laws of said state as public warehousemen in the storage and handling of grain.

IV. That at the time of the executing of said bond defendant, through its agents, knew that Chatterton & Son were, among other things, engaged in the handling and storage of grain, and said bond was executed with the intent of qualifying them as said grain warehousemen in the State of Montana.

V. That said bond was conditioned upon said Chatterton & Son making application to the Department of Agriculture, Labor and Industry, of the State of Montana, for a license to conduct and carry on the business of public warehousemen in the State of Montana, and [271] contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under the laws of said state governing public warehousemen.

VI. That neither said bond nor any renewal **thereof** was ever approved or filed with the State of Montana nor the Department of Agriculture, Labor and Industry **thereof**.

VII. That no application was ever made by Chatterton & Son for a license to conduct business as public warehousemen, nor any license ever issued

by the State of Montana, nor any department thereof, to said Chatterton and Son to engage in business as public warehousemen, as provided under the Statutes and laws of said State of Montana, or for any other purpose or at all.

VIII. That Chatterton & Son and its subsidiaries, during the time set forth in the complaint, engaged in the handling and storing of beans.

FINDINGS OF LAW.

I. That said bond in controversy was executed with intent to cover the storage and handling of grain, as distinguished from beans.

II. That said bond contemplated the licensing and supervision of Chatterton & Son by the State of Montana and the facts disclose that said Chatterton & Son were never licensed by the State of Montana, nor any Department thereof.

III. That there exists no basis for the plaintiff making claim under said bond.

IV. That there exists no basis for a reformation of said bond.

Respectfully submitted this 4th day of February, 1936.

WEIR, CLIFT, GLOVER
& BENNETT,
Attorneys for Defendant." [272]

And thereafter, on the 10th day of September, 1936, the Court made the following decision:

[PRINTER'S NOTE: "Decision of the Court here set forth in the typewritten record is already set forth in the printed record at pages 113-124, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [273]

[Title of Court and Cause.]

"STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, by and between counsel for the respective parties above named, that the above named defendant, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, may have to and including the 20th day of October, 1936, in which to prepare, serve and file its Bill of Exceptions to the Judgment and Decree [280] of the above entitled Court, made and entered on September 10th, 1936.

R. G. WIGGENHORN

Attorneys for Plaintiffs.

WEIR, CLIFT &

BENNETT,

Attorneys for Defendant."

[Title of Court and Cause.]

"PETITION.

Comes now the defendant above named, FIDELITY AND DEPOSIT COMPANY OF MARY-

LAND, and moves this Court that it may have to and including the 20th day of October, 1936, in which to prepare, serve and file its Bill of Exceptions to the decision and Decree of the above entitled Court, in favor of the plaintiff and against the Defendant, filed herein on the 10th day of September, 1936.

Dated this 14th day of September, 1936.

WEIR, CLIFT &
BENNETT

Attorneys for Defendant.”

(Filed September 15th, 1936.)

[Title of Court and Cause.]

“ORDER.

U p o n application of defendant, IT IS HEREBY ORDERED, that said defendant, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, may have to and including the 20th day of October, 1936, in which to prepare, serve and file its Bill of Exceptions to the Decree and Judgment of this Court, made and entered on the 10th day of September, 1936.

Dated this 15th day of September, 1936.

CHARLES N. PRAY

JUDGE.”

(Filed September 15th, 1936.)

AND NOW, within the time allowed by law and as extended by Orders of the Court, the defendant

excepts to the decision of the Court and presents this, its proposed Bill of Exceptions, and asks that the same be signed, settled and allowed as true and correct.

Dated this 20th day of October, 1936.

WEIR, CLIFT &
BENNETT,

Attorneys for Defendant. [281]

The undersigned attorneys, for and on behalf of plaintiffs in the above entitled case, do hereby acknowledge service of the above and foregoing Bill of Exceptions this 17th day of October, 1936.

R. G. WIGGENHORN

Attorneys for Plaintiffs.

[Title of Court and Cause.]

ORDER

Good cause having been shown, IT IS HEREBY ORDERED, that the date for the settlement of the defendant's proposed Bill of Exceptions, heretofore set and noticed for settlement at Great Falls on November 20th, 1936, at 10:00 o'clock A. M., is hereby extended to, and the date of settlement is hereby set for November 30th, 1936, at the Court Room of this Court, at Great Falls, Montana, at 10:00 o'clock A.M.

Dated this 20th day of November, 1936.

CHARLES N. PRAY

Judge.

(Filed November 20th, 1936.)

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED, by and between the respective parties hereto, that the foregoing Bill was served upon the attorneys for the plaintiffs on the 17th day of October, 1936; that thereafter and on the 26th day of October, 1936, the said plaintiffs, through their attorneys, served and filed herein its proposed Amendments thereto. That thereafter, by stipulation of counsel herein and by orders of said Court, the time for settlement of said Bill and the trial term of this Court having been extended, the said Bill was by agreement amended and said amendments incorporated therein so that the foregoing Bill of Exceptions as so amended contains all the [282] evidence given and the proceedings had on the trial of this action; that it is a correct statement of the evidence in said case and is correct in all respects, and that the same may be approved, allowed, settled and ordered filed and made a part of the record herein by the Judge before whom the cause was tried, without further or other notice to the parties or their counsel, and

they do hereby waive the right to be present at the settling and allowance of said Bill.

November 21st, 1936.

R. G. WIGGENHORN

Attorneys for Plaintiffs.

WEIR, CLIFT &

BENNETT

Attorneys for Defendant.

The above and foregoing Bill of Exceptions having been duly and regularly filed with the Clerk of said Court and thereafter duly and regularly served within the time authorized by law, and that due and regular notice of time for settlement and certifying said Bill of Exceptions having been given and the same having been presented for settlement within the time allowed by law and the term of this Court, as extended by the orders of this said Court;

IT IS HEREBY ORDERED, that the above and foregoing be and the same is herewith duly signed, certified and allowed as the Bill of Exceptions and statement of the evidence in said case, and as being true and correct, and the same is hereby made a part of the record in said cause, and ordered filed as such.

Done this 30th day of November, 1936.

CHARLES N. PRAY

Judge who presided at said Trial.

Lodged in Clerk's office Oct. 19, 1936.

[Endorsed]: Filed Nov. 30, 1936. [283]

Thereafter, on December 8th, 1936, PETITION FOR APPEAL was duly filed herein as follows, to wit: [284]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable, the District Court of the United States, in and for the District of Montana:

Comes now Fidelity and Deposit Company of Maryland, a corporation, defendant above named, and petitions the Court for an appeal herein, and respectfully represents:

That on the 10th day of September, 1936, the Court filed its written opinion herein and thereafter, on the 19th day of September, 1936, a final Decree or Judgment was entered in the above cause against the petitioner and in favor of the plaintiff, ordering and adjudging that the plaintiff herein do have and recover of and from the defendant the sum of Thirteen Thousand, One Hundred and no/100 Dollars (\$13,100.00), together with interest thereon at the rate of six per cent (6%) per annum from July 15th, 1931, and for costs.

That said defendant, conceiving itself aggrieved by said [285] Decree aforesaid, respectfully represents:

That certain errors were committed in the said Decree or Judgment and proceedings had prior thereto, to the prejudice of said defendant, all of which more fully appears from the Assignment of Errors which is filed herewith.

WHEREFORE, petitioner prays that an appeal may be allowed to it from the said rulings of the Court and said Decree, and from every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit; that its appeal be allowed and citation be issued, as provided by law, and that a transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rulings of said Court in said cases made and provided; and also that an order be made, fixing the amount of the security which the defendant shall give and furnish upon said appeal and that, upon the giving of such security, all future proceedings of this Court be suspended and stayed until the determination of the appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 7th day of December, 1936.

WEIR, CLIFT &
BENNETT,

Attorneys for Defendant and Appellant.

[Endorsed]: Filed Dec. 8, 1936. [286]

Thereafter, on December 8th, 1936, ASSIGNMENT OF ERRORS was duly filed herein, as follows, to wit: [287]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the said Fidelity and Deposit Company of Maryland, a corporation, defendant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause and from the decree of this Court, entered on the 19th day of September, 1936.

I.

The Court erred in overruling defendant's objections and motion to strike plaintiffs' proposed amended complaint.

II.

The Court erred in allowing plaintiff to file its amended complaint in this case.

III.

The Court erred in overruling defendant's motion to dismiss the amended complaint of plaintiffs, filed in this case.

IV.

The Court erred in sustaining plaintiffs' motion to strike [288] from defendant's answer the first and second affirmative defenses therein contained and by deciding the facts stated in said affirmative defenses were not sufficient to constitute a defense to the cause of action stated in plaintiffs' amended complaint.

V.

The Court erred in overruling defendant's objection to the introduction of any evidence made at the beginning of the trial thereof, on the grounds that the complaint failed to state a cause of action, either in law or equity, against the defendant and that there was a defect in parties plaintiff and defendant.

VI.

The Court erred in permitting the introduction in evidence of plaintiffs' Exhibit 2, as follows:

“Mr. WIGGENHORN: I offer Plaintiff's Exhibit 2 in evidence.

Mr. BENNETT: If the Court please, we have admitted that this bond was executed by us; but we object to its introduction on the grounds, however, that it is incompetent, irrelevant and immaterial, in that it does not show that it was ever approved or filed with the Secretary of Agriculture or any other department of the State of Montana.

The COURT: I suppose some proof with reference to that will come later?

Mr. WIGGENHORN: Yes, Your Honor.

The COURT: As to what was done with it?

Mr. WIGGENHORN: I might say, though, that it is confessed at this time that the bond was not filed.

The COURT: Promptly?

Mr. WIGGENHORN: No; nor filed in fact before the beans were deposited. It was filed, in

fact, after the beans were deposited, with the Commissioner. In the orderly proof we will present that.

The COURT: Of course, this goes to the gist of the action, and the bond will be received and considered, subject to the objection, to be ruled on later.

EXHIBIT 2.

[PRINTER'S NOTE: Exhibit 2—Bond No. 3591931 here set forth in the typewritten record is already set forth in the printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [289]

VII.

The Court erred in permitting the introduction in evidence of plaintiffs' Exhibit 3, as follows:

“Mr. WIGGENHORN: We likewise offer Plaintiff's Exhibit 3.

Mr. BENNETT: Of course, we admit that that was executed, Your Honor; and without repeating objection, I merely want to repeat the objection is made to the original bond as going to the renewal certificate.

The COURT: And this will also be received and considered, subject to your objection. [290]

EXHIBIT 3.

[PRINTER'S NOTE: Exhibit 3—Continuation Certificate No. 5809 here set forth in the typewritten record is already set forth in the printed record at pages 16-17, and is, pursuant to stipulation of

counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

VIII.

The Court erred in overruling the defendant's objection to plaintiffs' question and permitting the introduction of evidence, as follows:

“Q. At any rate, will you state now what, if any, representations or statements were made by you to customers or to persons offering beans for storage, prospective or otherwise, as to whether or not your warehouse was bonded, or whether you had such a bond?

Mr. BENNETT: We are going to object to that, to that line of testimony as being clearly hearsay and not binding on this company, the defendant, in any manner and not shown to have been made in the presence of any of the parties to this action.

The COURT: Well, it seems to me just now that it would be rather material, and part of the business, or at least it would encourage or promote trade with the warehouse to show that they were bonded and [291] that their product would be secure, if stored there.

Mr. WIGGENHORN: The theory upon which we are bringing the action, Your Honor.

The COURT: Yes, I will overrule the objection.

Mr. BENNETT: Exception.

I always maintained that we were bonded. It was always my understanding and I so represented to the growers. I communicated that generally to

the growers in this territory. It would apply to anyone who asked me.”

IX.

The Court erred in overruling the defendant’s objection to plaintiffs’ question and permitting the introduction of evidence, as follows:

“Q. Did you in fact offer it as an inducement to have growers store beans in your warehouse?

Mr. BENNETT: Just a moment; we make the same objection, and on the ground of it being hearsay testimony. And without interrupting, may I have that objection go to all this line of testimony, without repeating the objection?

The COURT: Yes; let it be understood that you object to this line of testimony, all of it, and note an exception to the ruling of the Court. And the same ruling.

A. Yes, I did.”

X.

The Court erred in sustaining the plaintiffs’ objections to defendant’s question and refusing to permit evidence to be introduced, as follows:

“Q. And did you at any time during your work for any companies other than Chatterton and Son ever make application for license to do business as a public warehouseman?

Mr. WIGGENHORN: Object to that as immaterial.

The COURT: Wasn't that stricken out of the pleadings, wasn't that set up in a separate and distinct answer that I sustained a motion to?

Mr. WIGGENHORN: That is correct.

The COURT: Well, I will sustain the objection.

Mr. BENNETT: Note an exception." [292]

XI.

The Court erred in sustaining the plaintiffs' objections to defendant's question and refusing to permit evidence to be introduced, as follows:

"Q. Will you state, if you know, Mr. Healow, whether or not you made application in the State of Wyoming for Chatterton and Son to do business under the laws of the State of Wyoming?

Mr. WIGGENHORN: The same objection, immaterial.

The COURT: The same ruling.

Mr. BENNETT: Note an exception. If the Court please, I was just following this as a matter of clearing myself on this. This man testified that he asked for Chatterton and Son to secure a bond because it had been his practice in the past, and I wanted to ask him about that, where and when he had done that.

The COURT: Yes. Well, you have. He said he got a bond for a certain purpose."

XII.

The Court erred in sustaining the plaintiffs' objections to defendant's question and refusing to permit evidence to be introduced, as follows:

“RE-CROSS-EXAMINATION

By Mr. BENNETT.

I got this bond for the protection of the storage holders.

Q. But you realized, or thought at the time that you were getting it, that it was necessary to be filed in the State of Montana in order to do business, did you not?

Mr. WIGGENHORN: I object to that as immaterial.

The COURT: Sustain the objection.

Mr. BENNETT: Note an exception.

The COURT: He has already gone into that, hasn't he? He said he got it, in direct testimony, for the protection of the bean owners.

Mr. BENNETT: Well, I believe, if I might show, that this man will say that those were procured to file with the State of Montana.

XIII.

The Court erred in permitting the introduction in evidence of [293] plaintiffs' Exhibit 1, as follows:

“The COURT: Yes. What is the objection to it?

Mr. BENNETT: The general objection that it is incompetent, irrelevant and immaterial, in that it is not shown that the original bond or the renewal certificate has been filed with the Department of Agriculture or approved, or that a license to do business in the State of Montana has been issued to Chatterton and Son.

The Court: Very well, it may be received in the same manner, and you may have the exception.

Mr. BENNETT: Yes, exception.

EXHIBIT 1.

[PRINTER'S NOTE: Exhibit 1—Re: No. 3591931—Chatterton & Son—here set forth in the typewritten record is already set forth in the printed record at pages 179-180, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

XIV.

The Court erred in overruling the defendant's objection to plaintiffs' question and in permitting the introduction of evidence as follows:

“Q. And did that in any way enter into your determination and [294] conclusion to put the beans in that warehouse?

Mr. BENNETT: Just a moment? That is objected to as incompetent, irrelevant and immaterial, not binding on this defendant, and hearsay.

Mr. WIGGENHORN: That is our case, Your Honor; that is our position, of course, that there must be a consideration, suing as we are on a common law bond, that we acted on reliance—each individual owner, that we acted upon reliance on the bond which had been given.

The COURT: I think so. Overrule the objection.

Mr. BENNETT: Note an exception.

A. It did.”

XV.

The Court erred in overruling the defendant's objection to plaintiffs' question and in permitting the introduction of evidence as follows:

“WILBUR SANDERSON,

called as a witness for the plaintiff, being first duly sworn, testified as follows:

(Mr. BENNETT: It is stipulated between counsel that this witness will testify in substance the same as the preceding witness; and to save time, that as to this line of testimony we wish to register a general objection that it is incompetent, irrelevant and immaterial, hearsay and not binding on this party defendant.

The COURT: That may be understood; and it is overruled, and it is excepted to.)”

XVI.

The Court erred in overruling the defendant's objection to plaintiffs' question and in permitting the introduction of evidence as follows:

“My name is H. A. Appleby. I live in the vicinity of Billings. I am one of the bean growers that deposited my beans in the Chatterton warehouse for the 1930 crop.

Mr. WIGGENHORN: And will you again admit that this witness will testify to the same thing that Mr. Deavitt testified, subject to your objection of course?

Mr. BENNETT: Yes.

The COURT: All right. [295]

XVII.

The Court erred in permitting in evidence the plaintiffs' Exhibit B", as follows:

"Mr. WIGGENHORN: In view of counsel's objection, I now offer the letter in evidence.

Mr. BENNETT: I want to offer a formal objection here. We object to the admission of Exhibit B on the grounds that it is a self-serving declaration and that it purports to state facts that have not been in evidence or testified to, and that it is not competent, relevant or material to the issues in this case, and that a part of this, the letter to which this purports to be a response, has not been offered in evidence or identified.

Mr. WIGGENHORN: May I say by way of argument, Your Honor, in reply to the objection that, as appears from the deposition, the previous question asked was, "And at that time it appears that in some manner or other it had been overlooked." And then Mr. Bennett objects to his testifying to that because the letter was not the best evidence, and then I offered the letter. And his objection now is that the letter is self-serving and incompetent, irrelevant and immaterial.

The COURT: Well, it seems to me that it may be material. You may want to raise a point on that.

Mr. WIGGENHORN: Shall I read the letter?

The COURT: Yes.

(Exhibit B read by Mr. Wiggenhorn.)

Mr. WIGGENHORN: By the way, it is offered, your Honor, merely to clear up the previous testimony, wherein he testified to the same facts occurring a year and four months earlier.

The COURT: Well, I think it would be material for that too. I will overrule the objection.

Mr. BENNETT: Note an exception.

EXHIBIT B.

[PRINTER'S NOTE: Exhibit B—Re: acknowledgement of receipt for bond here set forth in the typewritten record is already set forth in the printed record at pages 210-211, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [296]

XVIII.

The Court erred in sustaining the plaintiffs' objection to defendant's question and refusing to permit evidence to be introduced, as follows:

"A. They do not store grain in warehouses.

Q. That is true, but when you refer to a warehouseman and when you refer to a warehouse receipt, it might cover both the storage of beans or grain, regardless of whether they are in the warehouse or otherwise?

Mr. WIGGENHORN: Object to that as immaterial. "Warehouseman" was not the expression referred to.

The COURT: Yes, sustained.

Mr. BENNETT: Exception."

XIX.

The Court erred in overruling the defendant's objection to plaintiff's question and permitting the introduction of evidence as follows:

"The records I have referred to are voluminous; in fact, they filled most of my office. I think I worked on this report for a month and a half, off and on.

Mr. BENNETT: If the Court please, I want to just object to the report as a report, [297] insofar as the calculations shown in there are matters that were told him, in that for that reason the record as a whole does not appear to be merely ledger or book records taken from the books of the company.

The COURT: Well, I got that impression too, on the direct examination. But on the cross-examination he explained the source of his information, and it does seem as if it came from the books and the records that, under the system of conducting the business, that he must necessarily learn in going through the records.

Mr. WIGGENHORN: I think, Your Honor, you will find in going through the record that he was very careful in what information was given to him. He was merely asked as to the method. For example, I brought out that when he arrived at this price that he bases it upon the theory—something I, myself, told him for instance—that the conversion took place on the day of the shipment. Now, I merely told him, "You figure this

out on that basis.” And I think you will find that is true of all his statements where he says, “They told me.” But the fact basis, I think, is authentic and the testimony will bear it out completely.

The COURT: I gathered that on the cross-examination. I thought Mr. Bennett went over pretty carefully with him those different matters, and I don’t see how one could say it was hearsay or something somebody told him. I think I will overrule your objection.

Mr. BENNETT: Note an exception. [298]

EXHIBIT 18.

[PRINTER’S NOTE: Exhibit 18—Report on Chatterton & Son Storage Beans here set forth in the typewritten record is already set forth in the printed record at pages 18-21, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [299]

XX.

The Court erred in overruling the defendant’s objection to plaintiff’s question and permitting the introduction of evidence, as follows:

“Q. Now you may look at your own tabulations here, and I will ask you now to state what that net value thus calculated is?”

Mr. BENNETT: Just a moment? Objected to, if the Court please, for the reason that there is a so-called apparent hypothetical question, based on assumption of facts which I do not believe are proven, in trying to have this witness arrive at the measure of damages on a legal question; and

also object to this as merely an opinion and conclusion of the witness, and not competent or material to the issues in this case.

The COURT: He is arriving at a different basis on a different date? That is, this is the date of the closing of the warehouse?

Mr. WIGGENHORN: Giving ourselves the worst of it, Your Honor.

The COURT: Yes, that is what I thought.

Mr. WIGGENHORN: On the theory that if they say all they had to answer for was the price on the date of the closing of the warehouse; and presenting this matter to him for calculation, I ask him to state his conclusions from calculations.

The COURT: This theory is based upon facts, the same as the other?

Mr. WIGGENHORN: Absolutely, based upon facts, and against our interest. That is true. I want to say this to counsel, that this is a matter of calculation, and the Court has the right to calculate it for himself. That is to say, the report already in evidence discloses the facts that the witness himself used in the calculation, and it would take an accountant to figure it out. And I think there is no question, when we have such a complicated set of figures, when they can be confirmed, that counsel or the Court can sit down and compute it. But I understand the witness can testify as to his calculation, for the convenience of the Court. Of course, it can all be checked. If it don't work itself out, it can be disproved by counsel.

The COURT: I will overrule the objection.

Mr. BENNETT: Exception.

Q. Do you have the question in mind?

A. What was the question?

(Question read.)

A. \$37,260.76." [304]

XXI.

The Court erred in sustaining the plaintiffs' objection to defendant's question and refusing to permit the introduction of evidence, as follows:

"CROSS-EXAMINATION

By Mr. BENNETT.

Q. Mr. Lindsay, on your tabulation there, have you worked out any tabulation figuring the date of the conversion, say, the 15th or 17th of July, 1931?

A. I didn't quite get your question.

Mr. WIGGENHORN: Object to that question, Your Honor, because there would be no basis for the witness to make that computation; because he had no information to make that computation on.

Q. Well, let me ask you this question? Is this calculation that you are talking about there based on the market price of the beans around the 15th day of July, 1931?

Mr. WIGGENHORN: We object to that, Your Honor; the witness being incompetent to answer it, not qualified. His testimony shows that it is not based upon a value at any given time. It is based upon a fixed hypothetical value of \$2.25. It is not

for this witness to say what the value of beans is on a given day, not being qualified.

The COURT: I think so. I think that is apparent.

Mr. BENNETT. Exception.”

XXII.

The Court erred in sustaining the plaintiffs' objection to defendant's question and refusing to permit the introduction of evidence, as follows:

Q. Mr. Lindsay, how do you arrive at the basis of \$2.25 as an hypothetical value to make your computation?

Mr. WIGGENHORN: Objected to again, Your Honor, because that is the value I arbitrarily submitted to him for what it is worth. It isn't for him to arrive at. I arrived at it and the Court may or may not.

The COURT: I will have to sustain his objection.

Mr. BENNETT: Exception.”

XXIII.

The Court erred in overruling defendant's Motion for Dismissal of the action, made at the end of plaintiffs' case, as follows: [305]

“Mr. BENNETT: At this time, counsel for the defendant, Fidelity and Deposit Company of Maryland, moves for a dismissal of this action on the grounds of failure to state or prove a cause of action, either in equity or law, against this defend-

ant; for failure to prove that the so-called plaintiff is a true party, and for failure to show the capacity of the plaintiff to bring this action or in any way connect the plaintiff to the case and issues herein.

And for a further ground, for failure to prove that there is any compliance with the statutes of the State of Montana covering this so-called action.”

XXIV.

The Court erred in sustaining plaintiffs’ Motion to Strike the evidence of defendant, as follows:

“Q. In supplying this bond, was it of any interest to you or to your firm to determine precisely whether beans or grain were to be stored in the warehouse to be protected by the bond?

A. No. It would make no difference to me, but it might to the bonding company.

Mr. WIGGENHORN: If your Honor please, I ask that the answer to interrogatory number 16—that everything be stricken therefrom after, “No, it would make no difference to me?” Striking particularly the words, “but it might to the bonding company,” as not responsive to the question asked, and purely argumentative.

The COURT: Yes, strike it out.

Mr. BENNETT: Exception.”

XXV.

The Court erred in sustaining plaintiffs’ Motion to Strike the evidence of defendant, as follows:

“A. I can answer that it would make no difference to me, but it might to the bonding company.

Mr. WIGGENHORN: Again, I ask that the words, “but it might to the bonding company,” be stricken from the answer as not responsive, and argumentative.

The COURT: Yes, it isn't responsive. Let it go out.

Mr. BENNETT: Exception.”

XXVI.

The Court erred in overruling defendant's Motion to Dismiss, made at the close of all the evidence, as follows: [306]

“Mr. BENNETT: If the Court please, at this time I would like to renew, for the purposes of the record, the motion to dismiss that we made at the close of the plaintiffs' evidence, on the grounds therein stated, and on the further grounds that there is no proof shown anywhere that this bond covers the plaintiff, or that there was any mistake in fact as between the plaintiff, The State of Montana, herein and the defendant; that there is a defect in parties, in that the State of Montana shows no basis for making a claim under this bond, the bond not having been approved and filed and no license issued, as required by the laws of the State of Montana; and on the further ground that Chatterton & Son was a necessary party to this action, and has not been joined.”

XXVII.

The Court erred in holding and deciding that the plaintiff below could recover on the grounds that, if the said bond was not good as a statutory undertaking, it was good as a common law bond.

XXVIII.

The Court erred in deciding that this action could be brought in the name of the State of Montana.

XXIX.

The Court erred in holding and deciding that the defendant intended to insure beans when they used the form containing the word, "grain" in said bond.

XXX.

The Court erred in holding and deciding that the said bond should be reformed and the word, "beans" inserted therein in the place of the word, "grain".

XXXI.

That the evidence is insufficient to support the findings and conclusions of the District Court.

XXXII.

That the Court erred in failing to find that on or about the 7th day of January, 1930, said Chatterton & Son, by written application, signed by H. E. Chatterton, President, and A. H. Madsen, Secretary of said company, made application to defendant, Fidelity and Deposit Company of Mary-

land for a Public Warehouseman's bond to the State of Montana. [307]

XXXIII.

That the Court erred in failing to find that on the 7th day of January, 1930, pursuant to said application, a bond was executed by defendant to the State of Montana to qualify Chatterton & Son under the laws of said state as public warehousemen in the storage and handling of grain.

XXXIV.

That the Court erred in failing to find that at the time of the executing of said bond defendant, through its agents, knew that Chatterton & Son were, among other things, engaged in the handling and storage of grain, and said bond was executed with the intent of qualifying them as said grain warehousemen in the State of Montana.

XXXV.

That the Court erred in failing to find that said bond was conditioned upon said Chatterton & Son making application to the Department of Agriculture, Labor and Industry, of the State of Montana, for a license to conduct and carry on the business of public warehousemen in the State of Montana, and contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under the laws of said state governing public warehousemen.

XXXVI.

That the Court erred in failing to find that neither said bond nor any renewal thereof was ever approved or filed with the State of Montana nor the Department of Agriculture, Labor and Industry thereof.

XXXVII.

That the Court erred in failing to find that no application was ever made by Chatterton & Son for a license to conduct business as public warehousemen, nor any license ever issued by the State of Montana, nor any department thereof, to said Chatterton & Son to engage in business as public warehousemen, as provided under the Statutes and laws of said State of Montana, or for any other purpose or at all. [308]

XXXVIII.

That the Court erred in failing to find that said bond in controversy was executed with intent to cover the storage and handling of grain, as distinguished from beans.

XXXIX.

That the Court erred in failing to find that said bond contemplated the licensing and supervision of Chatterton & Son by the State of Montana and the facts disclose that said Chatterton & Son were never licensed by the State of Montana, nor any Department thereof.

XL.

That the Court erred in failing to find that there exists no basis for the plaintiff making claim under said bond.

XLI.

That the Court erred in failing to find that there exists no basis for a reformation of said bond.

XLII.

The Court erred in transferring this cause to the equity side of the docket.

XLIII.

The Court erred in finding that the general allegations of said Plaintiffs' Bill of Complaint were true.

XLIV.

The Court erred in ordering and granting judgment in favor of the plaintiff and against the defendant for the sum of Thirteen Thousand, One Hundred and no/100 Dollars (\$13,100.00), with interest thereon at the rate of six per cent (6%) per annum from July 15th, 1931, when the said bond or undertaking sued on in this action is limited in the penal sum of Ten Thousand and no/100 Dollars (\$10,000.00).

WHEREFORE, defendant prays that the said Decree may be reversed, and for such other and

further relief as to the Court may seem just and proper.

Dated this 7th day of December, 1936.

WEIR, CLIFT &
BENNETT,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 8, 1936. [309]

Thereafter, on December 8th, 1936, ORDER ALLOWING APPEAL was duly signed and filed herein, as follows, to wit: [310]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendant in the above entitled action, having filed herein its petition that an appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the Order and Decree made, rendered and entered in the above entitled Court and action on the 19th day of September, 1936, and that a citation be issued, as provided by law, and a transcript of the records, proceedings and papers upon which said Order and Judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rulings of said Court in said cases made and provided; and that an Order be made, fixing the amount of the security which the defendant shall give and furnish upon said appeal and

that, upon giving of such security, all future proceedings of this Court be suspended and stayed until the determination of the appeal by the United States Circuit Court of Appeals for the Ninth Circuit;

And the Court being fully advised, and it appearing therefrom [311] to be a proper cause therefor,

IT IS HEREBY ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Decree entered and filed herein on the 19th day of September, 1936, as aforesaid, be and the same is hereby allowed; and

IT IS FURTHER ORDERED, that a certified transcript of the record, evidence, Decree and all proceedings in the above entitled action be transmitted by the Clerk of the above entitled Court to said United States Circuit Court of Appeals for the Ninth Circuit;

IT IS FURTHER ORDERED, that the amount of bond on appeal be and hereby is fixed in the sum of Eighteen Thousand Dollars (\$18,000.00), which bond may be executed by the defendant, as principal, and by such surety or sureties as shall be approved by this Court and which shall operate upon approval by this Court as a supersedeas bond, and stay of execution is hereby granted pending the determination of such appeal.

Dated this 8th day of December, 1936.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Dec. 8, 1936. [312]

Thereafter, on December 8th, 1936, BOND ON APPEAL was filed herein, as follows, to wit: [313]

[Title of Court and Cause.]

BOND ON APPEAL.

Know All Men By These Presents:

That we, the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, as Principal, and AMERICAN BONDING COMPANY OF BALTIMORE, a Maryland corporation, authorized to act as surety under the laws of the State of Montana, as surety, are held and firmly bound unto the State of Montana and the Department of Agriculture, Labor and Industry thereof, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings, Montana, in the sum of Eighteen Thousand and no/100 Dollars (\$18,000.00) lawful money of the United States, to be paid to said aforementioned plaintiff, its certain attorneys, successors and assigns; to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seals and dated this 5th day of December, 1936.

WHEREAS, the above named FIDELITY AND DEPOSIT COMPANY OF [314] MARYLAND, a corporation, has prosecuted or is about to prose-

ecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Decree of the United States District Court for the District of Montana in the above entitled cause, in favor of the plaintiff and against the defendant, in the sum of Thirteen Thousand, One Hundred and no/100 Dollars (\$13,100.00) and interest and costs **taxed in the sum of One Hundred and Sixty-nine and no/100 Dollars (\$169.00);**

NOW, THEREFORE, the condition of this obligation is such that if the said above named FIDELITY AND DEPOSIT COMPANY OF MARYLAND shall prosecute its appeal to effect an answer of costs and damages and pay the judgment of the District Court if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT
COMPANY OF MARY-
LAND, a Corporation,

[Seal]

By: ABE KALIN

Attorney-in-Fact.

AMERICAN BONDING
COMPANY OF BALT-
IMORE,

[Seal]

By: ABE KALIN

Its Attorney-in-Fact.

Attest:

The within and foregoing bond is approved, both as to sufficiency and form, and is allowed as an

appeal bond and as a supersedeas bond, this 8th day of December, 1936.

CHARLES N. PRAY,
United States District Judge. [315]

POWER OF ATTORNEY
AMERICAN BONDING COMPANY
OF BALTIMORE

HOME OFFICE: BALTIMORE, MARYLAND.

Know All Men By These Presents:

That the American Bonding Company of Baltimore, a corporation of the State of Maryland, by J. G. Yost Vice-President and T. N. Ferciot, Jr., Assistant Secretary, in pursuance of authority granted by Article VI, Section 2, of the By-Laws of said Company, which reads as follows:

“The President, or any of the Vice-Presidents specially authorized so to do by the Board of Directors or by the Executive Committee, shall have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Resident Assistant Secretaries, and Attorneys-in-Fact, as the business of the Company may require, or to authorize any person or persons to execute on behalf of the Company any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, agreements and policies, and to affix the seal of the Company thereto.” does hereby nominate, constitute and appoint Abe Kalin, of Helena, Mon-

tana, its true and lawful agent and Attorney-in-Fact, to make, execute, seal and deliver, for, and on its behalf as surety, and as its act and deed: any and all bonds and undertakings. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

The said Assistant Secretary does hereby certify that the foregoing is a true copy of Article VI, Section 2, of the By-Laws of said Company, and is now in force.

IN WITNESS WHEREOF, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said American Bonding Company of Baltimore, this 30th day of December, A. D. 1935.

AMERICAN BONDING CO.
OF BALTIMORE,

[Seal]

By J. G. YOST,

Vice-President.

Attest: T. N. FERCIOT, Jr., Assistant Secretary.

State of Maryland,
City of Baltimore.—ss.

On this 30th day of December, A. D. 1935, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly

commissioned and qualified, came the above-named Vice-President and Assistant Secretary, of the AMERICAN BONDING COMPANY OF BALTIMORE, to me personally known to be the individuals and officers described in and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In Testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

(Signature unreadable.)

[Seal]

Notary Public.

[Endorsed]: Filed Dec. 8, 1936. [316]

Thereafter, on December 8th, 1936, CITATION ON APPEAL was issued herein, which original Citation is hereto annexed and is in the words and figures following, to wit: [317]

[Title of Court and Cause.]

CITATION.

To the Above Named Plaintiff and to its Attorneys
of Record:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal in the above entitled action, of record in the office of the Clerk of the District Court of the United States for the District of Montana, wherein the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, is Appellant and THE STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR AND INDUSRY THEREOF, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings, Montana, is Appellee, to show cause, if any there be, why the Decree and Judgment rendered against the defendant and appellant, as in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties hereto on that basis. [318]

WITNESS the Hon. Charles N. Pray, Judge of the District Court of the United States for the

District of Montana, this 8th day of December, 1936.

CHARLES N. PRAY,
Judge of the District Court of the United
States, District of Montana.

Service of the above and foregoing Citation admitted and copy thereof received this 11 day of December, 1936.

R. G. WIGGENHORN,
EVOR K. MATSON
Attorney General.

Attorneys for Plaintiff and Appellee. [319]

[Endorsed]: Filed Dec. 11, 1936. [320]

Thereafter, on December 11th, 1936, Praecipe for Transcript on Appeal was duly filed herein, in the words and figures following, to wit: [321]

[Title of Court and Cause.]

PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

Please prepare and certify Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action and include therein the following papers and documents:

1. Certificate of Clerk of State Court on Removal Proceedings.
2. Notice of Petition and Bond for Removal.

3. Petition for Removal.
4. Removal Bond for Costs.
5. Order of Court on Removal.
6. Original Complaint.
7. Original Answer.
8. Reply.
9. Plaintiff's Motion to File Amended Complaint.
10. Notice of Motion to Amend Complaint.
11. Objections of Defendant to Motion to Amend.
12. Amended Complaint.
13. Decision of Court Allowing filing of Amended Complaint.
14. Defendant's Motion to Dismiss Amended Complaint.
15. Stipulation submitting Motion to Dismiss.
16. Decision of Court on Motion to Dismiss.
17. Bill of Exceptions settled March 14, 1935.
18. Defendant's Answer.
19. Plaintiff's Motion to Strike affirmative defenses contained in Answer. [322]
20. Notice of **Motion to Strike**.
21. Stipulation submitting Defendant's Motion to Strike.
22. Decision of Court granting Motion to strike.
23. Bill of Exceptions settled January 18, 1936.
24. Stipulation Waiving Trial by Jury.
25. Stipulation Allowing Amendments to Answer.
26. Judgment.

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27. Bill of Exceptions settled November 30, 1936.
28. Petition for Appeal.
29. Assignment of Errors.
30. Order Allowing Appeal and fixing Bond.
31. Bond on Appeal.
32. Citation.
33. Clerk's Certificate.
34. This Praeipce.

Dated this 11th day of December, 1936.

WEIR, CLIFT &
BENNETT,

Attorneys for Defendant and Appellant.

Due personal service of within Praeipce made and admitted and receipt of copy acknowledged this 11th day of December, 1936.

E. G. WIGGENHORN
ENOR K. MATSON

Attorney General.

Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 11th, 1936. [323]

Thereafter, on December 28th, 1936, an AMENDED PRAECIPE for Transcript on Appeal was duly filed herein, in the words and figures following, to wit: [324]

[Title of Court and Cause.]

AMENDED PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

Please prepare and certify Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action and include therein the following papers and documents.

1. Certificate of Clerk of State Court on Removal Proceedings.
2. Notice of Petition and Bond for Removal.
3. Petition for Removal.
4. Removal Bond for Costs.
5. Order of Court on Removal.
6. Original Complaint.
7. Original Answer.
8. Reply.
9. Plaintiff's Motion to File Amended Complaint.
10. Notice of Motion to Amend Complaint.
11. Objections of Defendant to Motion to Amend.
12. Amended Complaint.
13. Decision of Court Allowing filing of Amended Complaint.
14. Defendant's Motion to Dismiss Amended Complaint.
15. Stipulation submitting Motion to Dismiss.

16. Decision of Court on Motion to Dismiss.

[325]

17. Bill of Exceptions settled March 14, 1935, except that you will omit therefrom the complaint at pages 2 to 11 inclusive, the Answer, at pages 13 to 24, inclusive, and the Amended Complaint at pages 27 to 34, inclusive of said Bill of Exceptions, for the reason that the same appear elsewhere in said transcript.

18. Defendant's Answer.

19. Plaintiff's Motion to Strike affirmative defenses contained in Answer.

20. Notice of Motion to Strike.

21. Stipulation submitting Defendant's Motion to Strike.

22. Decision of Court granting Motion to Strike.

23. Bill of Exceptions settled January 18, 1936.

24. Stipulation Waiving Trial by Jury.

25. Stipulation Allowing Amendments to Answer.

26. Decision of Court.

27. Judgment.

28. Bill of Exceptions settled November 30, 1936.

29. Petition for Appeal.

30. Assignment of Errors.

31. Order Allowing Appeal and Fixing Bond.

32. Bond on Appeal.

33. Citation.

34. Clerk's Certificate.

35. This Praecipe.

Dated this 24th day of December, 1936.

WEIR, CLIFT &
BENNETT

Attorneys for Defendant and Appellant.

[Endorsed]: Filed Dec. 28, 1936. [326]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes, consisting of 326 pages, numbered consecutively from 1 to 326 inclusive, constitute a full, true and correct transcript of all portions of the record and proceedings called for by praecipe and required to be incorporated in the record on Appeal in case Number 917, The State of Montana, ex rel Chatterton & Son, Plaintiffs, versus Fidelity and Deposit Company of Maryland, Defendant, as appears from the original records and files of said court in my custody as such Clerk;

And I do further certify and return that I have annexed to said Transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said Transcript of Record amount to the sum of \$63.85, and have been paid by the appellant.

WITNESS my hand and the seal of said court at Great Falls, Montana, this 28 day of December, A. D. 1936.

[Seal]

C. R. GARLOW,

Clerk. [327]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 8428.

FIDELITY AND DEPOSIT COMPANY, OF MARYLAND, a corporation,

Appellant,

vs.

THE STATE OF MONTANA and the DEPARTMENT OF AGRICULTURE, LABOR AND INDUSTRY thereof, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings, Montana,

Appellees.

STIPULATION FOR DIMINUTION OF RECORD.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action that in the printing of the Transcript

of the record herein the title of the Court and the title of the cause on the pleadings and documents need not be printed in full, but may be entitled thus, "Title of Court and Cause", and that the endorsement on each of said papers and documents, except the filing endorsement, may also be admitted.

IT IS FURTHER STIPULATED AND AGREED that in the printing of said Transcript no pleading or other document need be duplicated, and where said pleading or document is already in said printed Transcript, if the same thereafter appears in said Transcript it may be incorporated by reference to the prior page in said Transcript where same is already set forth.

Dated this 28th day of December, 1936.

WEIR, CLIFT &
BENNETT

Attorneys for Appellant.

R. G. WIGGENHORN,

Attorneys for Appellee.

SO ORDERED:

CURTIS D. WILBUR

Senior U. S. Circuit Judge.

[Endorsed]: Filed Dec. 31, 1936. Paul P. O'Brien, Clerk.

[Endorsed]: No. 8428. United States Circuit Court of Appeals for the Ninth Circuit. Fidelity and Deposit Company of Maryland, a corporation, Appellant, vs. The State of Montana and The Department of Agriculture, Labor and Industry Thereof, for use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton and Son, a corporation, at Billings, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed December 31, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.